Does the Permanent Establishment article give Namibia adequate taxing rights? An analysis of tax convention models in the mining and fishing industries.

by

Rikotoka Punaje Swartz

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Supervisor: Associate Professor Craig West

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ABSTRACT

Namibia is a country rich in natural resources and heavily dependent on foreign investment to effectively make use of those resources. It has a national policy of encouraging investment from other countries and has set up incentives for that purpose.

When there is a great deal of involvement of foreign companies in a country, international tax issues of judicial double taxation are discouraging to foreign investors. In an effort to address this risk, Namibia has entered into various double tax agreements with countries to ensure equitable taxing rights and encourage foreign direct investment. Double tax agreements are usually based on model tax agreements published by large international organisations, the most popular being the Organisation for Economic Cooperation and Development ("OECD") and United Nations ("UN"). The African Tax Administration Forum ("ATAF") has also recently formulated such a model for African countries.

As Namibia has a source based taxation system, giving up any taxing rights are of great concern and it must consider if these double tax agreements is in its best interest. Subsequently, Namibia has begun the process of renegotiating its tax treaties with other countries in hope of sacrificing fewer source taxing rights.

This dissertation analyses Namibia's current double tax agreements to determine whether the permanent establishment article offers sufficient protection for Namibia's source taxing rights with reference to Namibia's largest and most important industries of fishing and mining. The permanent establishment article is of particular importance as it usually provides an unrestricted taxing right to the income in the source country in which the permanent establishment is based. This study considers the permanent establishment article as it applies to the fishing and mining industries in Namibia. This includes a discussion of the mining and fishing industries in Namibia and a brief look at the applicable taxation regime. It also compares the permanent establishment article found in the OECD, UN and ATAF models to discuss which represents the most appropriate for Namibia to use as the basis for its renegotiations.

The agreements analysed do show some areas for concern to Namibia namely:

- The treaty with the United Kingdom is very out dated and may not give Namibia full territorial rights.
- Many of the treaties with developed countries have permanent establishment article that are based more on the OECD model than the UN model which is specifically designed to give developing countries more taxing rights.
- The permanent establishment article in the ATAF model gives the most taxing rights to the host/source country and has specific provisions negating the risk

of abuse by foreign companies. However, there is a concern that such provisions may have too wide a scope and discourage foreign investment.

- Most of the provisions of potential benefit to Namibia have been inserted in Article 5(2) and are arguably ineffective or less effective protections.
- Namibia's current DTAs contain no provisions directly related to fishing vessels which is of concern as fishing vessels are at risk of not being classified as permanent establishments. There are, however, arguments to be made for a fishing vessel as a mobile place of business forming a permanent establishment without such special provision.
- A specific deeming provision regarding the permanent establishment in the exploration phase of the mining process would be advisable if Namibia wished to create one in the mining industry as soon as possible.

ABBREVIATIONS AND ACRONYMS

ATAF	African Tax Administration Forum
ATAF MTC	ATAF Model Agreement for The Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
BEPS	Base Erosion and Profit Shifting
CMN	The Chamber of Mines of Namibia
DTA	Double Tax Agreement
ECOSOC	United Nations Economic and Social Council
EEZ	Exclusive Economic Zone
FSP	Foreign service providers
GDP	Gross Domestic Product
MTC	Model Tax Convention
OECD	Organisation for Economic Co-operation and Development
OECD MTC Commentary	Commentary to the OECD MTC
OECD MTC	OECD Model Tax Convention on Income and on Capital
PE	Permanent establishment
POEM	Place of effective management
SARS	South African Revenue Service
TAC	Total Allowable Catch
TSEZ Act	The Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UN MTC Commentary	Commentary to the UN MTC

UN MTC	United Nations Double Taxation Convention between Developed and Developing Countries

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1 BACKGROUND

Since Namibia's independence in 1990, it has maintained a policy of encouraging direct foreign investment and foreign operations within its borders (Namibia Investment Centre, 2013). As it is a country with a small population relative to its size (population density of 2.6 persons per km squared) (Government of Namibia, 2011) and with a relatively small economy, growth has relied heavily on international trade and co-operation. Given this fact, Namibia has instituted a number of initiatives to encourage foreign investment.

Cross-border activity has brought with it many of the traditional international tax problems, most notably the residence-source conflict, which has been largely addressed with double tax treaties. Namibia's taxing system is structured on a source basis (KPMG, 2013:1), which means that income from a Namibian source (or deemed to be from a Namibian source) are taxed under Namibia's fiscal legislation. However, most countries have a residence-based tax system (Pomerleau, 2015), which means that generally their residents can be taxed on all their worldwide income no matter the actual source of the income. A conflict arises when residents of those countries wish to carry on trade in Namibia, as both countries will wish to tax the income earned from such operations. This creates a potential for double taxation on the same income and as double taxation is detrimental to international trade and foreign investment, Namibia has entered into double tax agreements with various countries as a remedy to the conflict.

A double tax agreement ("DTA") is an agreement between the governments of two countries to enable the elimination of double taxation (SARS, 2016). This is done by allocating taxing rights between the two countries and providing relief for some kinds of taxes. The number of DTAs has grown significantly in the last 50 years, as they are considered an effective means of reducing financial uncertainty when operating in foreign countries. In 1960 only 71 bilateral treaties were in existence and by 2008 there were over 2289 (Parikh et al., 2011). DTAs are usually based on a model tax conventions created by international organisations, the main models being those of the OECD and UN. Namibia have DTAs with developed nations which are to a greater extent based on the Organization for Economic Cooperation and Development ("OECD") Model Tax Convention ("MTC") which was designed by the OECD to foster trade and economic development between its member countries and is the most widely used MTC in the world.

Most of the OECD member countries are developed nations (Murli, 2013:32) and the OECD MTC (OECD, 2014) was initially designed with interactions between them in mind. The result is that there is a bias toward the country of taxpayer residence rather than source. This bias is based on the premise that, as both countries are on an equal footing, the source country would enjoy the same benefits when trading or operating in

that other country. As this might not be the case between developing and developed nations there may be a risk that developing nations do not benefit as much from the model as the developed nation. According to Daurer and Krever (2012:1):

> *"Wealthier countries, particularly OECD nations, very often enter into treaties with each other to divide taxing rights flowing from their competing claims to tax the same income. Treaties limit the source country's taxing rights, leaving more room for the country in which the investor or business is resident to tax the profits. Where two capital exporting nations enter into a tax treaty, the limitation of the source country's taxing rights has little overall impact as each jurisdiction will sacrifice to the other taxing rights of profits from cross-border investment and business. If one party to a treaty is a capital importing nation, the treaty will shift overall taxing rights (and tax revenue) from the poorer country to the richer country."*

Namibia, like most developing countries, is a capital importing country actively trying to encourage foreign capital inflows. Therefore, when entering into double tax agreements with richer countries there is a risk that its taxing rights have not been adequately allocated given the unequal nature of the relationship between the countries. It is therefore not entirely surprising that Namibia's Ministry of Finance has recently begun the process of reviewing and renegotiating their DTAs currently in force (Immanuel & Fitzgibbon, 2017). Even though Namibia has a policy of encouraging foreign investment, this review of the DTAs has been deemed necessary. Any form of tax leakage has a significant impact on Namibian tax collections and a noticeable impact on their economic growth. This is because, as discussed above, Namibia makes use of the source basis for taxation and has a small population. This dissertation considers whether Namibia's current DTAs adequately protect the source based taxing rights with reference to its largest industries, namely the mining and fishing industries.

1.2 MINING IN NAMIBIA

The mining industry is the largest contributor of revenue to Namibia's economy. Taxes and royalties from mining account for 25% of the country's revenue and contributes a significant portion to its gross domestic product ("GDP") (11.6% in 2014) making it the single largest economic sector of the country. Within that sector, diamond mining is especially important as it account for the majority of revenue as a single source (8.6% of GDP in 2014) (Namibia Statistics Agency, 2014). Namibia also produces a variety of other minerals and is the fourth-largest exporter of non-fuel minerals in Africa. Additionally, Namibia is the world's fifth largest producer of uranium, and produces of large quantities of lead, zinc, tin, silver, and tungsten. It is estimated that Namibian

uranium mines are capable of providing 10% of the world's mining output (World Nuclear Association, 2016).

1.3 FISHING IN NAMIBIA

Currently, Namibia is also one of the largest seafood producers in Africa. The immediate objective of the Ministry of Agriculture following the country's independence was to rebuild the fisheries resources, which were previously severely exploited (Food and Agriculture Organization of the United Nations, 2013). The total fishing yield is currently about 380 278 tonnes per year. However, as the nutrient-rich South Atlantic waters off the coast of Namibia are some of the richest fishing grounds in the world, there is the potential for sustainable yields of 1.5 million metric tonnes per year (Food and Agriculture Organization of the United Nations, 2013). Commercial fishing and fish processing is the fastest-growing sector of the Namibian economy in terms of employment, export earnings, and contribution to GDP (International Business Publications, 2015).

As Namibia's most important industries, they require special consideration as to whether the country receives its fair share of taxing rights in relation to income generated.

1.4 PERMANENT ESTABLISHMENTS

This dissertation will focus on whether the permanent establishment ("PE") article in the DTAs are sufficient to protect Namibia's source taxing rights over these industries. The PE article (read with the attribution of business profits article) in the OECD model is critical in determining the taxing rights over business profits. A country will have taxing rights to the income earned if a company forms a PE in that country. Therefore, if Namibia can establish that a PE exists more readily, it opens the possibility of retaining the taxing rights and therefore the tax revenue from that business. The dissertation therefore analyses the PE article and its applicability to Namibia's major industries of mining and fishing to determine if the DTAs sufficiently allocate taxing rights to Namibia for these industries to protect the retention of its tax base. The dissertation will consider the *United Nations Double Taxation Convention between Developed and Developing Countries* ("UN MTC") and the *ATAF Model Agreement for The Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* ("ATAF MTC") as alternatives to the OECD MTC in their renegotiations.

1.5 SCOPE OF THE STUDY

The scope of this study will specifically address the issue of whether the PE article in the DTAs the Namibian government has entered into with the other countries is sufficient to protect Namibia's taxing rights as source country for income or profits. In this regards, the study will focus particularly on Namibia's mining and fishing industries, being Namibia's largest economic sectors. This study will examine whether the current PE clause in the DTAs creates too high a threshold for Namibia to retain taxing rights on income from these industries. In pursuit of that, this study will also analyse the PE article in OECD MTC, the UN MTC and ATAF MTC to consider which will be better suited for Namibia's needs. The mining and fishing activities and their PE consequences as well as the PE consequences of foreign service providers will all be considered. This study will consider Namibian DTAs which are "in force" or "pending" as at 1 March 2017. This study will not be directly concerned with whether or how domestic legislature actually taxes source income, but if the relevant DTA prevents such taxation in the source state.

1.6 RESEARCH METHODOLOGY

The research methodology employed in this study is derived from both the Descriptive and Evaluative Legal Research methods, as it attempts to gain an understanding of the current DTAs Namibia has in place and evaluate their effectiveness in retaining source taxation rights for Namibia with respect to the mining and fishing industries. The dissertation will entail a review of Namibian and international literature; Namibian DTAs; the OECD, UN, ATAF MTCs and their commentary regarding the taxing rights relating to the PE definition and the interpretation and its application. Any interpretation of international agreements and DTAs will be based on recognised customary interpretation of international law.

1.7 LIMITATIONS OF THE STUDY

The study will not consider in detail Namibia's domestic legislation concerning income derived from the mining and fishing industries. The dissertation is mainly concerned with the right to tax allocated in terms of the Namibian DTAs. The study will focus on the activities of foreign enterprises within the borders of Namibia and will not consider the dependant agent PE provisions in great detail.

1.8 STRUCTURE OF DISSERTATION

The dissertation that follows has the following structure:

- Chapter 2 provides a history and structure to the Namibian fishing and mining industries, including a legislative and regulatory background;
- Chapter 3 deals with the OECD MTC PE article in detail and how it would apply to the Namibian mining and fishing industries as well as how it differs in the UN and ATAF MTC;
- Chapter 4 analyses all the PE articles in the current DTAs Namibia has entered into from the perspective of the mining and fishing industries;
- Chapter 5 provides recommendations and observations to be considered in any renegotiations Namibia may be considering.

CHAPTER 2: THE MINING AND FISHING INDUSTRIES

The history of the mining and fishing industries in Namibia is complicated and was necessarily influenced by the history of the country. This history also significantly shapes its current legislative and regulatory environment. This Chapter provides a brief history of these industries and the legislative environment in which they operate to provide context for the concerns associated with the establishment of PEs. Though the domestic legislation of Namibia is not a focus for this dissertation, and indeed, it is not discussed to a significant degree here; it does inform the behaviour of the participants in these industries, which in turn determines when a PE is established.

2.1 TAXATION IN NAMIBIA

The Namibian taxation system applies the source basis of taxation. This means that residents and non-residents are taxed on all income received or accrued from a Namibian source or a deemed Namibian source, that is not of a capital nature. Namibia does not have ordinary capital gains tax (EY, 2016). As the tax treatment of residents and non-residents are normally the same, the questions of residence generally are not relevant except when the non-resident is from a country that has concluded a tax treaty with Namibia.

A non-resident company operating in Namibia need not register a branch or a subsidiary to be taxed on income from a Namibian source or deemed Namibian source. However, if that company is a resident in a treaty country, Namibia cannot tax as it normally would until the PE requirements of DTA has been met. Namibia will generally consider the PE requirements met if the non-resident treaty company registers a branch or subsidiary and tax the company accordingly (PWC, 2017). Therefore, a foreign company from a treaty country may potentially operate in Namibia without attracting tax for a while, if they decide not to register in Namibia.

However, this can be incorrect in terms of the DTAs. When a company registers a branch or subsidiary in Namibia, they should consider where the place of effective management ("POEM") is for the company. The OECD Commentary[1] mentions that the POEM is the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made. If these registered companies are effectively managed outside Namibia they would be resident in that other country according to Article 4 of the OECD MTC (OECD, 2014). The result being they would only be liable to pay tax in Namibia if the PE rules are met, not automatically.

The concern for the mining and fishing industries is that foreign companies may apply

[1] Paragraph 24 to Article 4 of Commentary to the OECD Model Convention

for fishing permits (Government of Namibia, 2000) or exploration licences (Ministry of Mines and Energy, 2013) without registering a branch or subsidiary and can potentially escape taxation until the PE requirements are met.

Fishing companies do not have specific income tax provisions related to them. The mining industry has a very specific tax regime designed to both encourage foreign investment and obtain revenue from its mineral wealth.

Income from the extraction of minerals (excluding petroleum) is subject to the same treatment as business income generally. However, special normal tax rates apply to mining companies on taxable income from mining operations, and the regular normal tax rates apply to taxable income from non-mining revenues - such as interest and rentals from certain assets.

The normal tax rate on income from mining operations (with the exception of mining for diamonds and petroleum) is 37,5%. Previously such income was taxed according to a formula that provided for a variation in the tax rate in accordance with the ratio of taxable income to gross revenue derived from such operations as per schedule 4 of Income Tax Act 24 of 1981 ("Income Tax Act").

The basic tax rate applicable to diamond mining taxable income is 50% plus a surcharge of 10%. The effective rate is, therefore, 55%. This rate also applies to income derived by a company from contract mining services rendered, other diamond taxes (schedule 4 of Income Tax Act).

Taxable income from mining for "petroleum" is taxed at a rate of 35%. These companies are also subject to additional profits tax that is calculated in terms of a complex formula contained in the Petroleum (Taxation) Act No. 3 of 1991. This Act is a comprehensive taxation law dealing with this specific industry, which is not dealt with in this dissertation as petroleum is no longer extracted in Namibia to any great extent.

In addition, there is a further royalty tax on minerals produced by mines. These taxes are imposed at varying rates in terms of section 114 of the Minerals (Prospecting and Mining) Act 33 of 1992.

The following rates apply:

Royalties on rough diamonds	10%
Royalties on rough emeralds, rubies & sapphires	10%
Royalties on unprocessed dimension stone	5%
Royalties on gold, copper, zinc & other base metals	3%
Royalties on Semi-precious stones	2%

Royalties on Nuclear fuel minerals	3%
Royalties on industrial minerals (fluorspar, salt, etc.)	2%
Royalties on non-nuclear fuel materials	2%
Royalties on oil/gas	5%

Table 1: Mining tax interest rates

Mining companies are required to withhold the non-resident shareholders' tax and non-resident tax on royalties and similar payments. Dividends from petroleum companies or from a parent company out of dividends received from wholly-owned petroleum subsidiaries may, however, be exempt from the non-resident shareholders' tax (section 48 of the income Tax Act).

The mining company tax rates do not apply to natural persons. Income from mining operations carried on by natural persons is included in their total taxable income and is subject to tax at the graduated normal tax rates applicable to individuals, though this is rarely the case in practice.

Mining companies also get special deductions in terms of the Income Tax Act. In order to encourage existing mining companies to conduct exploration activities, all such expenditure may be deducted when incurred. In the case of newly formed mining companies, all exploration expenditure incurred must be carried forward and is allowable in full in the year in which production commences (section 36 of the Income Tax Act).

The term "development expenditure" in relation to mining includes expenditure on motor vehicles, machinery, furniture, tools, equipment, shaft sinking, buildings of whatever nature, roads, etc. Such expenditure is accumulated and in the first year of production, the total development expenditure brought forward is added to the current year's development expenditure and is allowable over 3 years. After production has commenced, development expenditure incurred is deductible over 3 years. There is no ring-fencing of exploration or development expenditure.

Depletion or amortisation of the cost of acquiring mineral deposits or the right to extract minerals, unlike capital expenditure, may be deductible in the hands of a corporation or individual whose business is confined to exploration and realisation (i.e. dealing in rights), as opposed to mining.

The cost of restoring the environment on the cessation of mining operations is an allowable expense, as is the amount approved by the Minister, which is set aside as a provision for such future expenditure (section 18(2) of the Income Tax Act).

The deduction of expenditure relating to petroleum operations is governed by the Petroleum (Taxation) Act No. 3 of 1991, which is not dealt with in this dissertation as mining for petroleum is no longer mined in Namibia to any great extent.

2.2 CURRENT MINING COMPANIES IN NAMIBIA

Namibia has a number of large companies with active mines that have been operating in Namibia for a number of years(KPMG Global Mining, 2014):

Company	Owners	Product
AngloGold Namibia (Pty) Ltd	AngloGold Ashanti	Gold bullion
B2Gold Corporation	Private	Gold bullion
De Beers Marine Namibia	NamDeb 30%; De Beers 70%	Rough gem diamonds
Diamond Fields International	Private	Rough gem diamonds
East China Minerals Exploration and Development Bureau	Private	Zinc and lead concentrate; blister copper
Joint venture of Diamond Fields (Pty) Ltd	Diamond Fields International Ltd 100%	Rough gem diamonds
Langer Heinrich Uranium (Pty) Ltd	Paladin Energy Ltd 100%	Uranium
Namibia Custom Smelters (Pty) Ltd	Dundee Precious Metals Inc 100%	Zinc; blister copper
Ohorongo Cement (Pty) Ltd	Majority ownership: Schwenk Zement KG	
Okorusu Fluorspar (Pty) Ltd	Solvay S.A.	97%+ acid grade fluorspar
Rosh Pinah Zinc Corporation (Pty) Ltd	Glencore 80.08%	Zinc and lead concentrate
Rössing Uranium Ltd	Rio Tinto Group 69%; Government of Iran 15%; IDC SA 10%; Government	Uranium oxide

	3%; other 3%	
Sakawe Mining Corporation	Leviev Group of Companies	Zinc and lead concentrate; blister copper
Skorpion Mining Company (Pty) Ltd	Vedanta Zinc International 100%	SHG zinc
Swakop Uranium (Pty) Ltd	China General Nuclear Power Company (CGNPC)	Uranium oxide
Weatherly Mining Namibia Ltd	Weatherly International Plc 100%	Blister copper

Table 2: Major mining operation in Namibia

These companies all have significant ownership by foreign companies, as we would expect from a developing country like Namibia. Some of these Namibia has treaties with, such as South Africa and the UK. As these are active mines the PE requirements of the relevant tax treaties are undoubtedly met.

Namibia also has smaller mining companies listed in Australia, Canada and London, who are currently exploring for mineral in Namibia. The most important of these are(KPMG Global Mining, 2014):

Company	Listed on	Mineral interests
Kalahari Minerals	AIM - London	Uranium, gold and copper
UraMin	AIM - London	Trekkopje uranium deposit
Mount Burgess Mining	ASX - Australia	Diamonds near Tsumkwe
Paladin Resources	ASX - Australia	Langer Heinrich uranium deposit
Reefton Mining	ASX - Australia	Diamonds along Skeleton coast and base and industrial minerals in Erongo region
Afri-Can Marine Minerals	TSX - Canada	Diamonds
Helio Resources	TSX - Canada	Gold and copper
Forsys Metals Corp	TSX - Canada	Valencia uranium deposit, gold, copper, zinc
Teck Cominco	TSX - Canada	Gold, copper
TEAL Exploration and Mining	TSX - Canada	Otjikoto gold deposit

Table 3: Foreign listings with exploration interests in Namibia

Foreign companies may apply in Namibia for an exploration licence without registering a branch or a subsidiary at the Namibian Ministry of Trade and Industry. The companies

on Table 2 have set up either branches or subsidiaries in Namibia and explore for minerals through them, as they are the biggest explorers in Namibia. However smaller exploration companies may not have registered in Namibia. When such companies are from a treaty country such as the UK, they are not subject to Namibian tax until they have a PE in Namibia. Therefore, there is a risk that some of these companies will not be taxed on any Namibian source income until a PE is confirmed. It should be considered why Namibia would take this risk at all and the advantages and disadvantages associated with DTAs.

2.3 DOES NAMIBIA NEED TAX TREATIES?

As Namibia is entering into tax treaty negotiations, it needs a good understanding of why they are doing so, and the benefits and costs that arise from having tax treaties. The decision to enter into treaty negotiations with another country is not one to be undertaken lightly, especially for developing countries. There are both benefits and potential costs to developing countries from concluding a tax treaty, so it is desirable to have a comprehensive tax treaty strategy, agreed (if possible) across the whole of government (especially with foreign ministries), before embarking on tax treaty negotiations (Pickering, 2013:3).There are some developing countries who refuse to have tax treaties, either generally or with particular countries, because of a fear of reduced revenue as a result of the limitations on source taxation that such treaties impose.

For treaties between two developed countries, where the capital flows are approximately equal in both directions, the removal of tax obstacles to cross-border investment and the prevention of fiscal evasion provide clear benefits to both countries. Any reductions in source taxation are generally offset by increased residence-based taxation. The benefits to developing countries like Namibia (who does not have residence-based taxation) of tax treaties with developed countries, where the capital flows are almost exclusively one way, are less obvious. Nevertheless, the United Nations Economic and Social Council ("ECOSOC") stated that it was "*confident that tax treaties between developed and developing countries can serve to promote the flow of investment useful to the economic development of the latter, especially if the treaties provide favourable tax treatment to such investments on the part of the countries of origin, both by outright tax relief and by measures which would ensure to them the full benefit of any tax incentives allowed by the country of investment*"[2]. It is clear that careful consideration must be given to treaty negotiation to ensure a favourable tax position for Namibia while ensuring capital inflow.

As discussed in Chapter 1, DTAs were originally signed to avoid double taxation, i.e. the

[2] ECOSOC Resolution 1273 (XLIII) Tax Treaties between Developed and Developing Countries, 4 August 1967

taxation of the same underlying transaction by two governments. Currently, there are many reasons why countries enter into DTAs, and include the mitigation of international tax avoidance and evasion and thus the protection of the domestic tax base (Braun and Zagler, 2014,2). This purpose has increasingly come into the focus of policy makers of both industrialized and developing countries. The OECD Base Erosion and Profit Shifting ("BEPS") project reflects the political importance of these issues. In various ways, DTAs can contribute to achieve these goals. They address cross-border transactions between associated enterprises (article 9 of the 2014 OECD MTC) and they provide for information-sharing between the contracting states (article 26 of the 2014 OECD MTC). Furthermore, specific provisions and concepts are inserted such as the limitation of benefits provision or the beneficial ownership concept, which "restrict access to treaty benefits to residents of the contracting states."(Baker, 2014:2)

Besides this, industrialized nations and developing countries can have different motivations for signing tax treaties. As discussed in Chapter 1, there exists an asymmetric investment position between developed and developing countries, developed countries being in the position of net capital exporters, and developing countries typically being net capital importers. Developed nations maybe more concerned with fostering outbound investment and thus encouraging the international expansion of domestic companies (Braun and Zagler, 2014:3). Namibia has an interest in encouraging inbound investment, with policy makers wishing to attract foreign direct investment entailing the transfer of skills and technologies and thus fostering economic growth (Braun and Zagler, 2014:3). Another function of DTAs for developing nations is that they act as a signalling device indicating that the signatory states play by the internationally accepted tax standards.

Pickering (2013:4) suggests some reasons why countries sign DTAs:

- To facilitate and encourage inbound investment and inbound transfers of skills and technology by residents of the other country by:
    - removing or reducing double taxation on the inbound investment or transfers;
    - reducing excessive source taxation;
    - providing certainty and/or simplicity with respect to taxation of the inbound investment or transfers;
    - developing a closer relationship between tax authorities and business e.g. through the mutual agreement procedure;
    - maintaining benefits of tax concessions and tax holidays provided with respect to inbound investment or transfers.

- To reduce cross-border tax avoidance and evasion through:
    - exchange of tax information;

- mutual assistance in collection of taxes.

- Political reasons:

  - to send a message of willingness to adopt international tax norms;
  - to foster diplomatic or other relations with the other country;
  - to strengthen regional diplomatic, trade and economic ties;
  - to comply with international obligations e.g. under regional economic agreements;
  - to respond to pressure from the other country.

The most important benefit of DTAs for Namibia would be to encourage foreign investment. This should be done by providing a clear, transparent, non-discriminatory and predictable tax environment. Tax treaties can provide such an environment. While it seems self-evident that taxpayers looking to invest in another country will be encouraged to do so when they have confidence in the tax system of that country, there is little empirical evidence to show the *extent* to which the entry into a DTA will result in increased foreign investment (Baker, 2014:4). Also there is an argument to be made that as Namibia's mineral and sea resources are valuable enough that foreign investment is certain with or without DTAs. Nevertheless, it would appear that, for developing countries, a link can be made between conclusion of a DTA and increased foreign direct investment (Sauvant & Sachs, 2009)

Additionally, provision for tax sparing under the treaty may be of particular benefit to developing countries to the extent that it prevents revenue forgone by the country under its tax incentives being soaked up by the country of residence of the foreign investor (Pickering, 2013:20).

Increased foreign investment can have many benefits for a developing country in addition to increased revenue. Increased foreign investment is associated with higher economic growth, transfer of knowledge and skills, infrastructure building, increased employment and higher living standards (Braun and Zagler, 2014:10)

The increased certainty from DTAs is important to foreign investors, and the tax administrations in their country of residence. Even where there is little cross-border investment, like the treaty between Botswana and Namibia, DTAs can provide the benefits of increased certainty with respect to taxation (Pickering, 2013:23). While there may be little likelihood of attracting significant additional foreign investment through such treaties, the existence of a treaty would be expected to facilitate and encourage cross-border investment flows and economic activity between the two countries.

DTAs also help avoid tax evasion by ensuring that taxpayers do not escape taxation

by moving capital abroad, or by not declaring income earned abroad, or by participating in abusive tax avoidance schemes. There are provisions on the exchange of information and, where provided, assistance in the collection of tax debts (Pickering, 2013:23).

That being said, DTAs limit the source taxation of certain income derived by non-residents. This will have an immediate impact on revenue in the source country, especially with respect to the PE requirement and withholding tax collections, if the treaty rate of withholding is significantly lower than the domestic law rate. The revenue cost of source tax limitations imposed by DTAs will largely depend on the capital flows between the countries. However, it is important to consider not just the existing flows, but also the potential for future growth, both in inbound investment and in the domestic economy. The short-term loss of revenue from reductions in withholding tax rates (or other limitations on source taxation) may be wholly or partly offset by increased revenue resulting from increased foreign investment, growth in the economy or reduced fiscal evasion (Pickering, 2013:23). However, there is no effective methodology for accurately predicting the future revenue benefits that could result from DTAs.

DTAs may affect or limit the operation of certain domestic tax laws. DTAs include certain rules that take precedence over domestic law, such as:

- rules for determining profits of related enterprises. These require the profits of a subsidiary or a permanent establishment of a foreign enterprise to be determined on an arm's length basis, irrespective of whether this is consistent with domestic law calculation of profit;

- non-discrimination rules. These may prevent the operation of domestic law rules that have been designed to protect the revenue by taxing foreign enterprises in a particular way;

- treaties may also limit future tax policy options (Pickering, 2013:21).

While DTAs do not prevent changes to domestic law, such changes will not be effective where an inconsistent treaty provision exists. As a country's treaty network grows, this will increasingly limit the effectiveness of future tax changes where those changes do not accord with the DTAs.

There is also the risk of treaty-shopping and double non-taxation (Braun and Zagler, 2014:11). DTAs can create unintended double non-taxation where a treaty provision precludes taxation in one country of income or capital that is not taxed in the other country. This is one of one the issues BEPS is trying to address. While in some cases the contracting states may deliberately provide that certain income is not subject to tax in either country (Pickering, 2013:22), DTAs are generally not intended to create double non-taxation.

DTAs with low-tax countries may also result in double non-taxation or in reductions in revenue without reciprocal benefits in the other country. DTAs with low tax countries may provide a competitive advantage to investors from such countries over domestic investors or investors from other treaty partner countries, since the overall tax burden on investors whose income is not subject to tax (or is subject only to very low tax rates) in their country of residence will be significantly lower than the tax burden on investors who have to pay ordinary tax rates. Treaties with low-tax countries are also likely to encourage treaty-shopping through those countries. Any tax administration concerns with these countries might be better addressed through Tax Information Exchange Agreements (Pickering, 2013:23).

DTAs can also require certain changes to domestic law be made to ensure that the treaty can be properly applied and administered. It may be necessary to enact law that provides that, in the event of any inconsistency between the treaty and domestic law, the treaty obligations prevail (Pickering, 2013:23). Changes may be necessary to ensure that treaty obligations can be met, e.g. to ensure that the competent authority has the legal and practical ability to collect and exchange bank information if requested by treaty partner country.

There are significant costs to having tax treaties, but also important advantages beyond foreign direct investment. By understanding what outcomes are desired, and how treaties can assist in achieving those outcomes, countries are better able to determine whether or not to enter into treaty negotiations. Understanding the reasons for entering into treaty negotiations will also help Namibia to design treaty policies that are best suited to achieving their desired outcomes (Braun and Zagler, 2014:13).

2.4 THE MINING INDUSTRY IN NAMIBIA

The history of mining in Namibia begins with its German colonisation. This is not surprising as a major reason for colonisation is resource extraction. In 1915, South Africa wrested control of Namibia from Germany as part of UK's effort to weaken the Germans during World War I. From that time to 1990, it governed Namibia and had control over Namibia's mineral rights, such power being granted to it by the Mines, Works and Minerals Ordinance (1968) (Alberts, 2010:10).

Following Independence on 21 March 1990, the mining laws were reviewed and changed by the new Namibian government. The respective governments had different goals regarding Namibia's mineral wealth and to that end a change in legislation was required. The Namibian government created a new legal framework resulting in new laws and policies regulating the industry (Lupalezwi, 2014:42). These were set up through the Ministry of Mines and Energy, which has the stated purpose of developing Namibia's mineral wealth for the benefit of all Namibians.

We can see that there is a history in Namibia of foreign entities benefiting from Namibian mineral wealth, which has sparked initiatives to limit possible exploitation while trying to encourage foreign investment in the industry. Taxation legislation is of great concern as a method to implement this policy.

Taxation policy must be informed by the mining process itself as those activities are relevant for the establishment of PEs.

2.4.1 The Mining Process in Namibia

The mining life cycle in Namibia places goes through certain phases, as illustrated by Figure 1 (KPMG Global Mining, 2014:36):

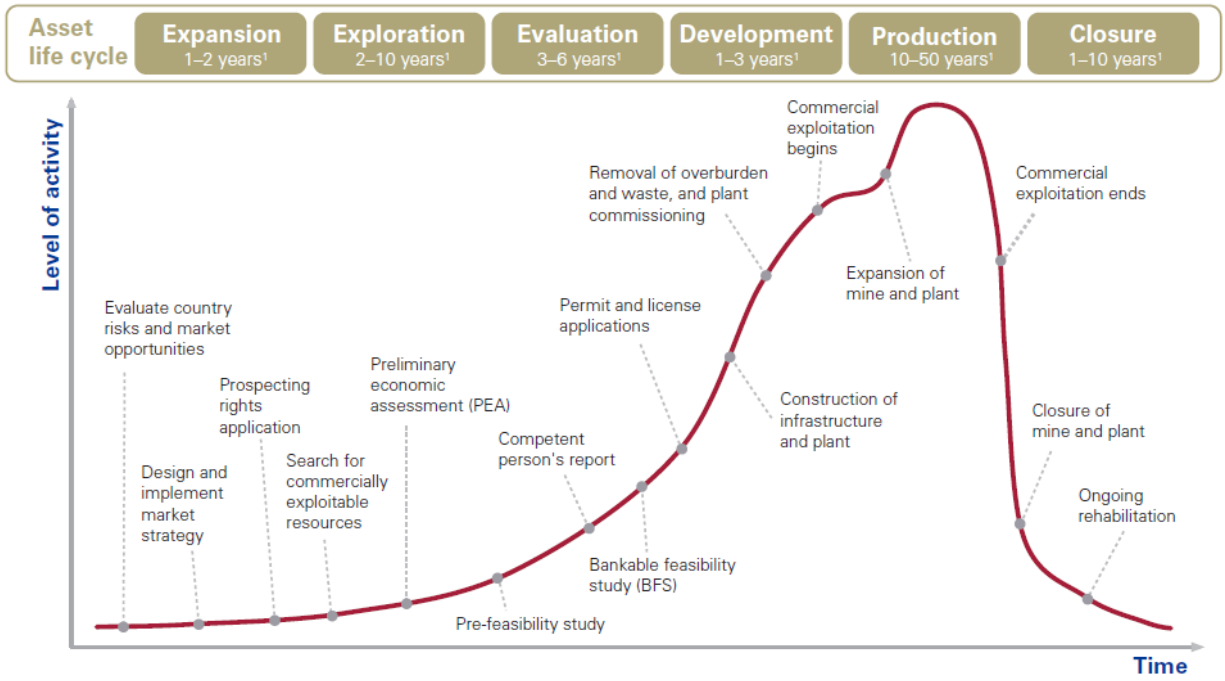

Figure 1: Mining asset life cycle

The type and level of activity in the mining process is determined by evaluating in which phase of the mining process the business is currently. The mining time scale differs according to the type of mineral being mined and whether the mine is based on land or in the ocean; however, the phases do generally remain the same. It is important to understand what the activities are at each phase of the process, as it is usually the activities of the entity which determines the establishment of a PE.

Expansion and exploration is generally between 2 and 10 years. At this stage, the company decides if they want to explore for mineral wealth in Namibia by evaluating risks and opportunities presented by the endeavour. If they decide to proceed with the exploration they apply for the appropriate exploration permits with the Ministry of

Mines and Energy and plan their exploration. The activities performed during the exploration phase largely depend on the mineral that is being sought and where the exploration takes place.

Evaluation and development phases generally involve applying for mining permits, construction of the mine infrastructure and getting equipment. At this stage it becomes clearer that a PE has been established. Article 5(3)[3] of the OECD MTC (OECD, 2014) becomes relevant as this phase generally lasts 3 to 6 years, it is almost certain that a PE will be established. Additionally, at this stage the exploration results have indicated that there is a resource which is valuable enough and present in significant quantities to justify the creation of a mine. Thus, avoiding a PE becomes moot as the mine will almost certainly cause a PE to be created once it moves into its production phase.

This report will therefore focus mainly on the uncertainty surrounding activities of the company and its main service providers in the exploration and evaluation phase, where there is some uncertainty as to when a PE has been established. Early establishment of a PE is of benefit to the source country, where the activities are profitable, and therefore Namibia may have an interest the early identification of a PE set up in the exploration phase, especially for its most profitable minerals.

2.4.2 Major Minerals in Namibia

2.4.2.1 *Uranium*

The mining of uranium is a leading mining activity in Namibia as the country boasts the fourth largest uranium mine in the world (World Nuclear Association, 2016:1). Captain Peter Louw discovered radioactivity in the area of the current Rössing mine in 1928 (Southern African Institute for Environmental Assessment, 2010:3). The Anglo American Corporation subsequently carried out exploration in the area, but it was not until the 1960s that a number of low-grade alaskite ore bodies[4] were identified along the north side of the rugged Khan valley (Southern African Institute for Environmental Assessment, 2010:3).

The importance and value of uranium is its potential to generate large amounts of energy (Merkel & Schipek, 2011:254). In addition to that, the timing of the discovery of uranium was of also of great significance to its importance. In the 1960s and 1970s, the global demand for uranium increased substantially as interest in nuclear energy production reached its height (Southern African Institute for Environmental Assessment, 2010:4). However, despite its use in energy production, uranium's demand

[3] Article 5(3) states that a building site or a construction or installation project constitutes a PE if it lasts for more than 12 months.

[4] These are intrusive uranium deposits found in certain rock near the top of the ground that are created by the action of ore-carrying fluids or vapours emanating from magma (Rogers *et al.*, 1978:3).

has varied over the years which has caused its price and quantity mined to fluctuate (Merkel & Schipek, 2011:254). Uranium prices deceased from very high prices in the late 1970s, to very low prices in the early 1990. Towards the end of the 1990s prices started recovering, while in the prices from 2003 to 2007 have shown their most rapid increase ever (Smith, 2007:8).

This has caused Namibia to experience a huge increase in uranium exploration. Today Namibia appears to be popular amongst the Australian and English (Sherbourne, 2006:20) uranium exploration companies for a range of technical, financial and regulatory reasons. The ore bodies are all found on or close to the surface which allows open cast mining; and the ore grades are high enough to make large-scale mining economically viable (Southern African Institute for Environmental Assessment, 2010:2). The Namibian infrastructure, although stretched, is considerably better than that found in many other African countries and the uranium mines are located close to a sea port; facilitating the import of process chemicals and the export of yellow cake, and there is a relatively straight forward regulatory framework in place to manage and control uranium mining and all related impacts (Southern African Institute for Environmental Assessment, 2010:2).

2.4.2.2 *Uranium mining process*

Uranium mining in Namibia is exclusively land-based, though generally take place close to the ocean. The uranium mining process is largely as follows in Figure 2 (International Atomic Energy Agency, 1991:10):

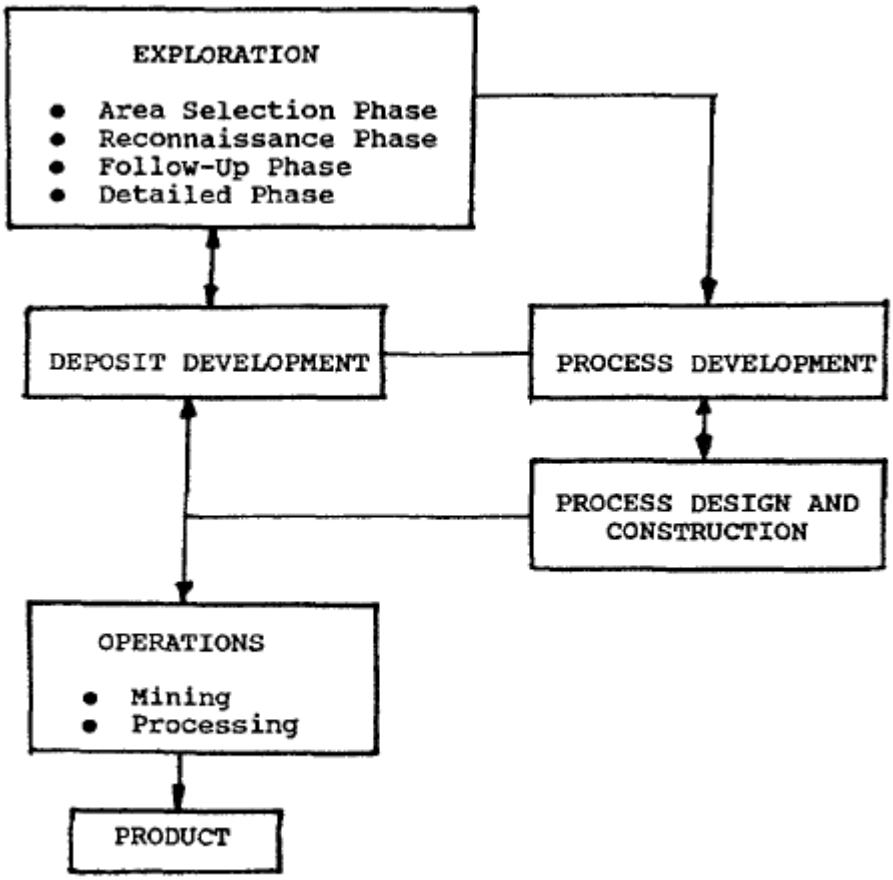

Figure 2: Uranium mining process

According to the International Atomic Energy Agency (1991:11-16) the phases in the exploration phase are distinct and serve separate functions:

- **Area selection:** The phase of area selection is the beginning of any uranium exploration scheme. Starting with a region of perhaps 100 000 km^2, mainly office studies are made in an attempt to define those parts of the region with the greatest uranium favourability.[5]
- **Reconnaissance phase:** The objective of the reconnaissance phase is to locate areas of interest in the areas previously selected for exploration. Several

[5]Historically, prospectors would explore a region on foot with a pick and shovel. Modern prospecting uses a variety of geological methods. **Geology** experts use a direct method to discover surface mineral deposits by examining the area visually. **Geophysics** experts use an indirect method to identify underground mineral deposits by detecting rock alterations under the surface. **Geochemistry** can also be used to analyse samples of soil, rock, and water. These methods are supplemented by aerial or satellite photography, and combined with historical maps and literature to develop detailed maps of surface and underground rock formations. Drilling is used to search for mineral occurrences or the clues in the rocks that may lead to them. Information gathered in this stage may or may not lead to a discovery of valuable minerals (The University of Arizona, 2017).

exploration methods may be considered for use during the reconnaissance phase either used singly or in combination.

- **Follow-up phase:** The objective of the follow-up phase is to locate exactly on the ground the extent of anomalies in the areas of interest. This objective is achieved by resampling the areas of interest at greatly increased sample density.
- **Detailed phase:** The objective of the detailed phase is to distinguish between anomalies due to potentially economic mineralization and those due to uneconomic mineralization or other causes.
- **Deposit development:** The proving of the deposit is properly the work of the development programme, and requires methods of mineralogy, structural geology, sampling, ore test work, and ore reserve estimation that are different from, and much costlier than, those of the exploration programme.

2.4.2.3 *Diamonds*

Diamond mining is the largest part of the Namibian mining industry and has attracted the investments of multiple foreign companies (The De Beers Group, 2013:1). Diamonds in Namibia were famously discovered by Zacharias Lewala a railway worker in April 1908 (Namdeb, 2010:1). Soon after that the *Deutsche Kolonialgesellschaft für Südwest-Afrika* within a month, which was a German trading and administrative company in Namibia at that time, took control of diamond industry as it was (Schneider, 2009:320).

World War I and the South African take over interrupted operations but they gradually resumed late in 1915. Between 1908 and 1919, 6.26 million carats were recovered. In 1920, most of the stakeholders agreed to amalgamate their mineral rights into the Consolidated Diamond Mines of South West Africa Ltd, and Kolmankop, Elizabeth Bay and the Pomona area became the centres of operations (Marine Diamond Mining, 2010:2). Currently diamond mining takes place mostly in the Namibian ocean rather than on land, which has a potential effect on their PE status discussed in Chapter 3.

2.4.2.4 *Marine diamond mining process*

The process for marine diamond mining, broadly speaking is as follows (De Beers Group, 2017):

- **Scanning seafloor**: This is part of the evaluation phase of the mining process. Resource development is carried out by scanning the seabed using geophysical mapping. This is followed by sampling, which determines the amount of the reserve.

- **Mine plan**: Once the geophysical mapping and sampling is done, those finding, along with other parameters, form the basis of a mine plan. The mine plan ensures that the diamonds identified are brought to the surface in the most efficient and economical way.
- **Cutting seabed**: At this stage the mining process begins. A horizontal crawler, attached to one of the marine mining vessels floating on the ocean's surface, moves along the identified area to begin dredging the seabed.
- **Extracting sediment**: Up to 60 tonnes of sediment are lifted each hour to the vessel through a giant pipe attached to the crawler.
- **Sediment sorting**: On board, the sediment is washed and sifted into increasingly smaller stones using a series of vibrating racks then rotating drums that crush rocks.
- **Removing sediment**: Sediment that doesn't contain diamond-bearing material is passed back to the ocean. At this stage the natural eco-system of the ocean floor is closely monitored as per Namibian environment legislation. Rehabilitation of marine mining environments occurs naturally, unlike land-based mines.
- **Packaging diamonds**: No human hands touch the diamonds as they follow an automated process before being sealed into a series of small, barcoded containers.
- **Transporting diamonds**: The containers are then loaded into cases and, a few times a week, and are escorted onto a helicopter that flies to vaults onshore.

The "Scanning seabed" and "Mining plan" stages of the operation would amount to expansion and exploration phase and once the "Cutting seabed" occurs, the development phase of the mining process begins.

Namibia also produces copper, lead, zinc, tin, silver, and tungsten from its mines in large quantities. Exploration and mining for these minerals are still important activities and contributors to Namibia's GDP, but diamond and uranium mining remain the most lucrative minerals for the country.

2.4.3 Current mining laws of Namibia

Upon its establishment, the Namibian government immediately began the process of regulating the mining industry. It's new Constitution[6] empowered the government of Namibia to claim sovereignty and ownership over its over mineral and natural wealth and, additionally to implement laws and regulations over these resources.

The main laws governing the mining sector of Namibia are the Minerals Development

[6] Article 100 of the Namibia Constitution states that "Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned."

Fund of Namibia Act of 1996, Diamond Act of 1999 and the Minerals Prospecting and Mining Act 33 of 1992. While these laws govern the mining sector in Namibia directly, the Foreign Investment Act of 1990 and the Namibian Investment Centre ensure that Namibia is marketed as an attractive investment destination in Southern Africa and play a part in the regulation of the industry (The Republic of Namibia, 1993).

2.4.4 Minerals Prospecting and Mining Act 33 of 1992

The Minerals Prospecting and Mining Act 33 of 1992 ("Minerals Act") is the fundamental piece of legislature regulating the mining sector in Namibia. This is because it concerns the licensing procedure of mineral rights, the rights of their holders, the administration and the ownership of minerals in Namibia (Alberts, 2010:20). These are all the core and practical aspects governing the mining procedure. The Mineral Act of Namibia was amended in 2008 to make provisions for the introduction of a royalty on mining companies' turnover of 5 percent. The amendment was put in place as a response to the increasing number for new uranium exploration licences (British High Commission, 2014:67).

As with most important and lucrative resources of a country, there is significant debate on the best way to administer the mining industry. The Chamber of Mines of Namibia ("CMN") has expressed concern on whether increased state involvement in the affairs of mining is advisable for that industry. It has stated that "increased involvement of the state in mining would be a discouraging factor for future private investment" (Alberts, 2010:45). However, it does not seem likely that government will cede control and ownership of minerals wealth in Namibia[7].

In addition to the various legislation that regulates the industry, in 2002 Namibia also created the National Mineral Policy. This policy states that the government must create a conducive and enabling legislation, fiscal and institutional environment to attract private sector driven exploration (Mining Communications Ltd, 2005:3). This is part of the government efforts to encourage foreign and private investment in Namibia's mining industry.

Some specific amendments have been made in the Minerals Act over the years to encourage investments. Additionally, the Foreign Investment Act of 1990 ("Investment Act") provides assurance to foreign investors that they will get equal status regarding tax treatment with local businesses (Harases, 2011:13). The Investment Act also provides foreign investors with guarantees in respect of investment security,

[7] Section 2 of the Mining Act states that: "*Subject to any right conferred under any provision of this Act, any right in relation to the reconnaissance or prospecting for, and the mining and sale or disposal of, and the exercise of control over, any mineral or group of minerals, vests, notwithstanding any right of ownership of any person in relation to any land in, on or under which any such mineral or group of minerals is found in the state*."

repatriation of capital, access to foreign currency and international arbitration in case of disputes (Namibia Investment Centre, 2013).

The Namibian government appears to have goals which can sometimes be in conflict, these being to encourage investment and to retain control over its resources. We can see this conflict reflected in the competing goals that arise from renegotiating DTAs; namely, trying to obtain tax revenues and encouraging foreign investment. In trying to improve its overall tax position, the Namibian negotiators must consider both these goals carefully.

2.5 FISHING INDUSTRY IN NAMIBIA

Despite Namibia's status as a developing nation, it has made some very significant achievements in fisheries management. Namibia has one of the most productive fishing grounds in the world, mostly because of the Benguela sea current which brings nutrient rich water from the south (Chiripanhura & Teweldemedhin, 2016:8). In 2013, exports of fish and fishery products were valued at USD 787 million. Most of the horse mackerel is sold frozen in the African market, while the bulk of hake and anglerfish production is exported to the European Union (Chiripanhura & Teweldemedhin, 2016:8).

Prior to its independence, there was extensive and largely unsustainable fishing in Namibia (Sherbourne, 2014:2). In addition, Namibia was also not able to control its 200 nautical mile Exclusive Economic Zone ("EEZ"), which contained its most lucrative fish stocks. This is because the international community would not recognise South Africa's jurisdiction over the area and therefor it could not be controlled or regulated effectively (Lange, 2003:3). Only after Namibia's independence would the other countries recognise their right to control the fish within its EEZ.

On 30 December 2015, the Income Tax Amendment Act, 2015 (Act No. 13 of 2015), was promulgated, to amend the definition of "Namibia" to include the EEZ where it had previously only included the territorial waters.[8]

The effect of this recent amendment was to extend Namibian sovereignty for tax purposes. This effectively increased the Namibia's source net for income tax purposes. However, as discussed above, one of the drawbacks of having DTAs is the fact that amendments to domestic legislature becomes less effective when dealing with residents of treaty countries. The double tax agreements and the PE concept are still relevant in

[8]The definition of Namibia in the Income Tax Act reads as follows: *""Namibia" means the Republic of Namibia and, when used in geographical sense, includes the territorial sea as well as the exclusive economic zone and the continental shelf over which Namibia exercises sovereign rights in accordance with its national and international laws concerning the exploration and exploitation of the natural resources of the sea-bed and its subsoil and the superjacent waters as defined in sections 2, 4, and 6 of the Territorial Sea and Exclusive Economic Zone of Namibia Act, 1990 (Act No. 3 of 1990)"*

determining whether Namibia can actually claim taxing rights from those residents, as Namibia is still bound to the DTAs and International Sea Law through the various agreements it has entered into.

2.5.1 Structure of the fishing sector in Namibia

Namibian government established the Ministry of Fisheries and Marine Resources ("the Ministry") after independence, which has the responsibility for fisheries and aquaculture. The Ministry have a policy to rebuild fish stocks and to manage them more sustainably. According to Chiripanhura & Teweldemedhin (2016:10), the Ministry had the following three main objectives:

- Rebuilding fish stocks and controlling their exploitation.
- Establishing effective mechanisms for the monitoring and surveillance of resource use and exploitation.
- Establishing a flourishing fishing industry that would add value to the resource and empower the Namibian public.

In an effort to achieve these objectives, the Ministry enacted the Sea Fisheries Act in 1992, eventually replacing it with the Marine Resources Act in 2000. The legislation is also supported by the Regulation No. 241 (2001), which regulates the use of marine resources (Chiripanhura & Teweldemedhin, 2016:11).

The Marine Resources Act re-emphasized the country's obligations to the management of marine resources and allowed Namibia to sign agreements like the Law of the Seas (1982) and the UN Fishing Stocks Agreement (1995); as it now could comply with their requirements (International Business Publications, 2015:104). Namibia had also by then joined the International Commission for the Conservation of Atlantic Tunas and the South-East Atlantic Fisheries Organisation. Fish that are highly valuable for commercial purposes are managed through quotas and Total Allowable Catch ("TAC"), in line with the international agreements signed.

The Ministry and fishing businesses operating in Namibia are in co-operations to make certain that marine resources are used optimally and sustainably. The TAC amounts are determined using scientific statistics; reducing uncertainty and help facilitate cooperation between the Ministry and the fishing businesses. These TACs are enforced by the issue of licences which are tied to the sea depth(Chiripanhura & Teweldemedhin, 2016:12), as follows:

> The first type of licence is for small and pelagic fish that live near the surface of the sea, such as a few species of tuna, pilchards, and anchovy. The fishing season runs from January to August. Many holders of these licences are foreign

enterprises although there is a number of local companies which have licencing rights.

- The second type of licence is for mid-water fish stocks found between the sea surface and the bedrock. This includes horse mackerel and hake. The fishing season runs the length of the year.
- The third type of licence is for demersal fish located close to or at the lowest level of the ocean. These include species like hake, sole, and monk.
- The fourth type of licence is deep-water fishing, which is for orange roughy and alfonsino, though these catch sizes have significantly decreased over the years.

(Chiripanhura & Teweldemedhin, 2016:12).

Other sea products in Namibia include crabs, rock lobster, oysters, seals, guano, and seaweed. Companies do however often lack the boats and equipment for the types of fishing required; and often have to either sell these licences or lease the equipment from the larger foreign companies (Sherbourne, 2014:67). This practice of leasing equipment from foreign companies has the potential of creating a PE in Namibia. This is further explored in Chapter 3.

Similar to the mining industry, Namibian policy makers have highlighted a need to have control over their fishing resources and the ability to benefit from them. However, the signing of international fishing agreements and meeting their standards shows a desire to be recognised as a part of the international community and the need of foreign support. The involvement of foreign companies in Namibia's fishing industry and to Namibia's benefit would partly depend on those companies' ability to form PEs in Namibia. Being part of the international fishing community means gaining an understanding of International Sea Law and its interplay with the PE concept.

2.5.2 International Sea Law

Historically, the oceans had been subject to the freedom-of-the-sea doctrine, a 17th century principle that limited national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline. The remainder of the seas was proclaimed to be free to all belonging to none (Zinchenko, 2009). By the mid-1950s, it had become increasingly clear that the then existing international principles governing ocean affairs were no longer capable of effectively guiding conduct on and use of the seas (The United Nations, 2012). Larger and more advanced fishing fleets owned by distant water fishermen were endangering the sustainability of fish stocks in waters outside their own coasts through over-exploitation; the marine environment was increasingly threatened by pollution caused by industrial and other human activity; and tensions between countries over conflicting claims to the oceans and its vast resources were intensifying. In view thereof, the United Nations convened various conferences on

the Law of the Sea in order to write a comprehensive treaty for the oceans. This led to the adoption in 1982 of the United Nations Convention on the Law of the Sea ("UNCLOS") (The United Nations, 2012)[9].

International law pertaining to the sea is set out in the UNCLOS. UNCLOS establishes a legal order for the use of the seas and oceans and *inter alia* promotes the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment (Harrison, 2007:23). UNCLOS determines the rights and obligations of all operations in Namibian territorial waters and its exclusive economic zone, and therefore have a huge impact on both the mining and fishing industry activities.

Namibia became a signatory to and ratified UNCLOS in 18 April 1983. The Territorial Sea and Exclusive Economic Zone of Namibia, Act 3 of 1990 ("TSEZ Act") concerns the maritime zones of Namibia and other related matters, as a response to and in compliance with UNCLOS.

As described by Gelineck (2016:1), UNCLOS defines the certain limits regarding the sea and the areas in which nations have the right to exploit marine resources. These are as follows (Christian, 2015):

[9] Akintoba (Akintoba, 1996:87) in his study, African States and Contemporary International Law: A case study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone, states the following with respect to the EEZ:
"Few other concepts have achieved such rapid acceptance in international law as the 200-mile exclusive economic zone, which was unknown as a notion in the 1960s but had become unchallengeable as a legal construct by the mid-1980s."

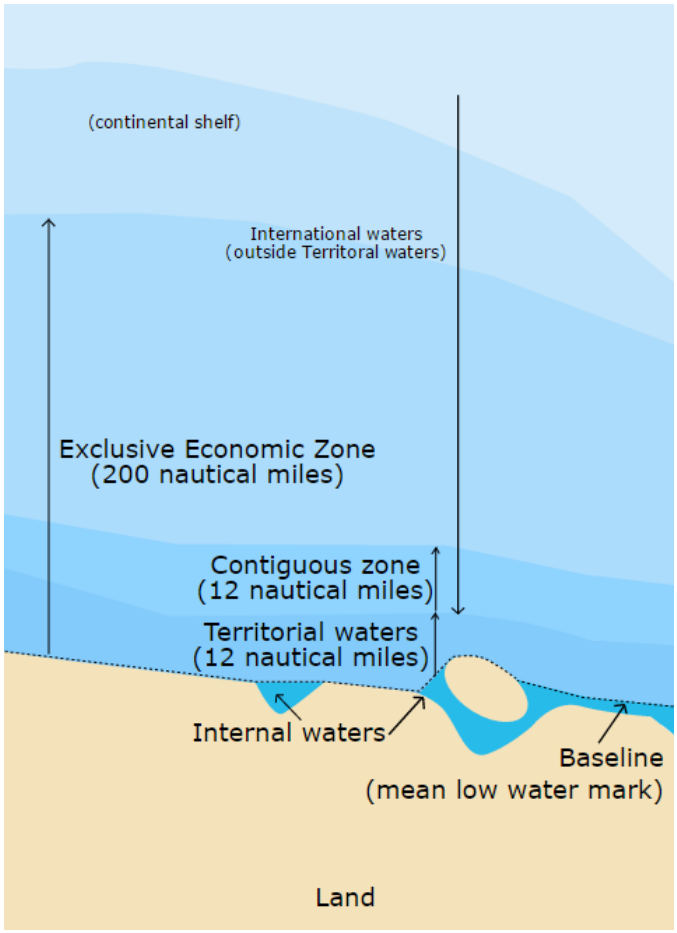

Figure 3:Sea areas in international rights

- **Baseline**: this is the low-water line along the coast, as marked on large-scale charts officially recognized by the coastal State. The baseline is used to measure the boundaries of the sea from land (UNCLOS Article 5).
- **Internal waters**: this is the water on the landward side of the baseline of the territorial sea, which forms part of the internal waters of the coastal state (UNCLOS Article 8).
- **Territorial sea**: this can be defined by each member state up to a limit not exceeding 12 nautical miles measured from the baseline. Within the territorial sea, states have exclusive sovereignty to the sea, airspace and seabed, which means that states are free to pass laws governing this area and to use any resources there. The sovereignty over the territorial sea is still however subject to UNCLOS and to other rules of international law (UNCLOS Article 2). Typically, a state's tax legislation covers activities that take place in its territorial sea as a minimum (Gelineck, 2016:1).
- **Contiguous zone**: this is an area up to 24 nautical miles from the baseline. Within the contiguous zone, coastal states are free to enforce their legislation relating to customs, taxation, immigration and sanitation to prevent the violation of such legislation in their territory or territorial waters (UNCLOS Article 33(1) and (2)).

- **Exclusive economic zone ("EEZ"):** this area can measure up to 200 nautical miles from the baseline. In the EEZ, coastal states have the exclusive rights to exploring and exploiting, conserving and managing natural resources, whether living or non-living, in the water or on the seabed. Contrary to the rights in the territorial waters, a state's rights within the EEZ are limited to activities that relate to the natural resources below the surface, whereas the surface of the sea outside the territorial sea is considered international waters (UNCLOS Article 56(1)(a) and 57).
- **Continental shelf**: this is defined as the seabed and subsoil of the areas that extend beyond the territorial seas of states either throughout the natural prolongation of their land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines (UNCLOS Article 77). On its continental shelf, each state has the exclusive right to exploring and exploiting natural resources. In addition to the 200 nautical miles' boundary, states may elect to extend their continental shelf up to 350 nautical miles following the baselines according to the provisions set out in article 76 of UNCLOS.

As described above each designated area described in the UNCLOS give Namibia different rights and obligations within that area. The most important of these areas for the fishing industry is the EEZ as it contains the majority of Namibia's fishing stocks.

2.5.3 UNCLOS and the Exclusive Economic Zone

The concept of the exclusive economic zone is one of the most important pillars of the UNLOS (Carroz, 2017:2). The regime of the exclusive economic zone is perhaps the most complex and multifaceted in the whole Convention. The accommodation of diverse issues contributed substantially to the acceptance of the concept and to the Convention as a whole. It is a concept which has received rapid and widespread acceptance in state practice and is thus now considered by some to be part of customary international law (Carroz, 2017:2). This concept at its core deals with the concept of territory and jurisdiction.

Dugard (2011:234) states the following in respect of territory:

> *"Territory occupies an important place in international law. A state will not qualify as a 'state' unless it has a defined territory. Moreover, the extent of a state's sovereignty or jurisdiction will in most instances be limited to the extent of its territory."*

Whether the EEZ can be considered part of Namibia's territory is partly addressed in the UNCLOS. It certainly gives Namibia many rights and responsibilities concerning the

EEZ suggesting at least partial sovereignty. Part V of the UNLCOS establishes a specific legal regime, as well as the rights, jurisdiction and duties of the coastal and other States in the EEZ. As regards to the exploitation of fishing resources (referred to as living resources) the following applies:

- The coastal State has sovereign rights for the exploitation, conservation and management of the fishing resources found in the EEZ (UNCLOS Article 56(1));
- In exercising its rights and performing its duties under UNCLOS in the EEZ, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of UNCLOS (UNCLOS Article 56(2));
- The coastal State shall determine the allowable catch of the living resources in its EEZ. The coastal State shall ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by over-exploitation (UNCLOS Article 61);
- The coastal State shall promote the objective of optimum utilisation of such living resources. Consequently, where the coastal State does not have sufficient capacity to harvest the entire allowable catch, and after having considered national and regional interests, it shall through agreements or other arrangements (for example, joint ventures) give access to other States to the surplus of the allowable catch (UNCLOS Article 62);
- The coastal State shall put in place laws and regulations consistent with UNCLOS to regulate the exploitation and conservation of the fishing resources. This would *inter alia* include the licensing of fishermen and fishing vessels, the determination of which species to be caught and quantities thereof (UNCLOS Article 62(4));

Approximately 90% of the world's fishing resources are found in the various states' EEZs (Bjørndal & Munro, 2007), and hence the need to put in place universally accepted rules that seek to protect the fishing resources from over-exploitation and resultant depletion of resources that occurred prior to the adoption of UNCLOS, whilst at the same time also protecting the marine environment.

It should also be noted that although the coastal State has preferential rights to exploit the fishing resources of its EEZ, other States have other rights of use of the EEZ which are provided for in UNCLOS, for example, the freedom of navigation and overflight, the laying of submarine cables and pipelines in the coastal State's EEZ.

Namibia’s right over its EEZ is also connected to the continental shelf, which is of particular importance to its mining industry as a significant amount of mining takes place there.

2.5.4 International law - continental shelf

UNCLOS provides a universally acceptable framework for the peaceful uses of the EEZ and continental shelf, as well as the use of the resources found therein. Part VI on UNCLOS establishes a specific legal regime applying to the continental shelf:

- The coastal State has sovereign rights for the purpose of exploring and exploiting the natural resources found in the continental shelf. These rights are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State. The exclusive rights do not depend on occupation, effective or notional, or on any express proclamation (UNCLOS Article 77).
- "*Natural resources" consist of "the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to the sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil*" (UNCLOS Article 77(4)).
- The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the airspace above those waters (UNCLOS Article 78(1)).
- Finally, the exercise of the rights of the coastal State over the continental shelf must not infringe with the navigation and other rights and freedoms of other States as provided for by UNCLOS (UNCLOS Article 78(2)).

A coastal State's rights pertaining to the continental shelf are those to administer to the exploration and exploitation of "natural resources". Whether Furthermore, Article 78(1) makes it clear that the rights that the coastal State has over the continental shelf, do not affect the legal status of the EEZ. Section 6 of the TSEZ Act deals with the continental shelf. Section 6(2) provides that:

> *"(2) for the purposes of […] the exploitation of the natural resources of the sea; […] and any provision of any law relating to mining, precious stones, metals or minerals, including natural oil, which applies in that part of Namibia which adjoins the continental shelf, be deemed to be State land."*

Namibia's domestic laws do seem to claim jurisdiction over the continental shelf. Whether they can claim absolute sovereignty aside, it is clear from UNCLOS and domestic laws that Namibia has preferential rights over the EEZ and continental shelf and therefore its mining and fishing resources.

Whether the DTAs Namibia has entered into allow Namibia to exploit its territorial

scope will be examined in detail in Chapter 4 and its effect on the PE definitions therein.

2.6 CONCLUDING REMARKS

The Namibian mining and fishing industries have both the legislative and tax framework set up to make the most of these resources. There are specific institutions set up to deal with the needs of these industries and legislation to regulate them. For the mining industry there is even a specific taxing regime set up to encourage investment and obtain tax revenue. This is not to say that these efforts have been wholly effective and are not open to manipulation or abuse; but the effort have been made and are currently Namibia's domestic legislation allows it to benefit from foreign direct investment. Namibia has also signed multiple international agreements related to fishing and their oceans. These agreements delineate Namibia's role and powers concerning its territorial waters, EEZ and continental shelf. They allow Namibia to be able to regulate fishing activity in its EEZ and gain tax revenue from fishing activity. However, when dealing with a company that is a resident of a treaty company, Namibia's ability to tax is limited by that treaty and the PE concept. This becomes a problem especially when that company does not register a branch or subsidiary in Namibia and we must first consider whether the company has a PE before Namibia can tax as it normally would. A close analysis of the PE concept would therefore be required to determine if Namibia gives up too much of its taxing rights when it signs DTAs.

CHAPTER 3 PERMANENT ESTABLISHMENT IN MINING AND FISHING INDUSTRIES

3.1 MINING & FISHING INDUSTRIES AND PERMANENT ESTABLISHMENTS

The mining and fishing industries do of course involve vastly different types of activities and structures, and therefore have different issues to consider with regards to PEs. This Chapter will endeavour to discuss these activities as well as the PE concept itself and general concepts in international law. This Chapter will also more specifically consider the definition of PEs and its history, as well as how it can relate to the mining and fishing industries in Namibia.

3.2 WHAT IS A PERMANENT ESTABLISHMENT?

The term "permanent establishment", as the main focus of this dissertation, requires some discussion to determine its application to the mining and fishing industries in Namibia. As described by Vogel (1999:280), "*the existence of a permanent establishment is the decisive condition for the taxation of income from business activities and of capital pertaining to such activities*." Its establishment causes very specific and undeniable tax consequences making tax avoidance more difficult. It is one of the most important concepts in international tax as it plays a significant role in the elimination of judicial double taxation (OECD, 2001:6).

Essentially, a PE is used to represent the level of contact required to justify local authority of source over business activities undertaken by a foreign enterprise (Passos, 2008:135). It is the manner in which the business activities are carried on which determines if there was definite, organised contact or if presence is established. This is the minimum business presence which forms a core concept of PEs, as is of particular importance to the source country.

The significance of the PE concept stems from the fact that it establishes the right of the state of source to tax the business income of a foreign enterprise; but it also relieves that state of the limitations imposed on its taxing rights by the articles dealing separately with certain types of investment income (Passos, 2008:135).

Vogel (1999:280) comments that growing international economic interdependence has resulted in the treaty practice being to narrowing the definition of PE further and further, especially with industrialised countries. However, too narrow a definition of PE does unilaterally favour the residence state when the states involved have imbalanced capital investment and trade flow. Such an imbalance could erode the economic incentives offer by the source state and their economic policies. The UN MTC (UN, 2011) has adopted a broader definition of the term PE and the ATAF MTC (ATAF, 2016) even more so, though Vogel (1999:281) does warn that an exaggerated broadening of the PE

concept may discourage developed nations engaging in certain kinds of trade. This is of particular concern in Namibia as it must not discourage foreign investment in its renegotiations.

Broadly speaking there are two ways a PE can be formed. The first is what is usually referred to as a "general rule PE" which is concerned with Article 5(1) to 5(4) of the OECD, UN and ATAF MTC (ATAF, 2016). The second type of PE is called an "agency PE" though this is not within the scope of this study. In *SIR v Downing 1975 AD* it was held that when determining whether a taxpayer has a permanent establishment in a Contracting State, regard must be had to the provisions of Article 5 as a whole and not to the individual paragraphs read in isolation. Therefore, it is prudent that we touch on most aspects of the articles to consider its impact as a whole.

3.3 GENERAL RULE PE

3.3.1 The General Rule (Article (5)(1))

The OECD, UN and ATAF MTC Article 5 (1) defines a PE as: "a fixed place of business through which the business of an enterprise is wholly or partly carried on."

The Commentary on the OECD MTC (OECD, 2010:92) refers to this as the "general definition" of PE. Further, it states that it describes "*the essential characteristics of a permanent establishment in the sense of the Convention, i.e. a distinct "situs", a "fixed place of business"."*

A number of conditions and test have been devised over the years to assist in the determination of a general rule PE. Some of these are as follows:

- **The place of business test**: this is the existence of a physical place of business i.e. a facility such as premises or, in certain instances, machinery or equipment.
- **The location test**: this is that the place of business must be "fixed" geographically, i.e. located at a specific area, it must be established at a distinct place with a certain degree of permanence.
- **The permanence test:** this is that the business must use of the place of business for a period of time.
- **The right of use test**: this is that the place of business should be "at the disposal" of the enterprise.
- **The business connection test**: this is that the business activities must be carried out "through" the place of business. This means usually that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.

These will be considered in the context of the Namibian mining and fishing industries.

3.3.2 The "place of business" test

As a general rule, although the term "place of business" is not defined as such in the OECD MTC (OECD, 2014), a non-resident enterprise would be considered to have a place of business in a country only if it has physical presence there in the form of any premises, facilities or simply a certain amount of space at its disposal. The place of business must be a physical area or object that serves the business needs of the company (Skaar, 2005:2.2.1). Mere business relations with enterprises or customers are not sufficient.

Considering this broad view of "place of business" discussed it is submitted that a fishing vessel does constitute a place of business as it is a physical asset, occupying physical space, that does functions as a place where business actually does take place, that business being fishing. It is also submitted that, as mining operations require some physical presence almost from the beginning, it is clear that a "place of business" is certainly involved. The "place of business" test should be satisfied when considering activities in both the mining and fishing industries as those activities usually relate to the business of the enterprises and the nature of those enterprises usually require a physical presence.

3.3.3 Location test

The location test does however provide certain difficulties, especially in the fishing industry. In order for the location test to be satisfied, the OECD Commentary (OECD, 2010:94) requires a "*link between the place of business and a specific geographical point*". This means that a "place of business" must be located at a particular spot inside Namibia's taxing jurisdiction to trigger at PE. This does not pose a problem with an office, plant, or indeed a mine, but does leave some uncertainty as to whether a fishing vessel can be seen as "fixed". The nature of an operating mining is to be fixed and as Namibia does not drill for hydrocarbons, the issue of mobility regarding floating drilling rigs is not relevant for this report and therefore will not be directly considered. Diamond marine mining (as discussed in Chapter 2) does involve mobility in the exploration phase, however once a deposit is detected, it remains fixed to that area.

The "fixed" quality is quite important for establishing PEs as the Commentary on Article 5 of the OECD Model (OECD, 2014) notes that: "*it is immaterial how long an enterprise of a contracting state operates in the other contracting state if it does not do so at a distinct place*".

The character of a fishing vessel is that it's mobile and it does not always operate within a fixed geographical location. At first glance it therefore appears that a fishing vessel

must fail the location test for establishing a PE. However, given the nature of fishing itself, such out-of-hand-dismissal would be inappropriate. It remains crucial to analyse the concepts of "place of business" and "fixed" with regards to a fishing vessel specifically to properly obtain an understanding of how the test should be applied.

The OECD Commentary (Article 5 Paragraph 5) states that the a place of business does not need to be fixed to the floor in order to be considered permanent and the ability to move does not in itself negate the "fixed" criterion (Larking, 1998:267).

Passos (2008:139) agrees with this statement, commenting that while geographic identity within source state is required, there is no requirement that the assets must be attached to the soil. He mentions that the place of business must have a certain degree of permanence. Also, continuous business operations must be carried on at that place and not merely on a sporadic or temporary basis. It's the permanence of the operations which also give the place its "fixed" quality. Therefore, there is an argument to be made that it isn't the actually mobility that would cause a fishing vessel to not be considered "fixed". The OECD Commentaries state that "fixed" does not necessarily mean fixed to the earth and that permanence is a better indicator of "fixed". As Passos (2008:139) states, it's the permanence of the operations which should be considered to determine if the place of business is fixed.

If the OECD Commentary provides that mobility does not mean that a place of business cannot be regarded as permanent; we must consider under what circumstances an enterprise can move and still remain permanent. Larking (1998:267) argues that the movement at the end of business activity or movement from a business activity to another business activity would not cause that business to lose permanence; as there would be no business activity carried on between activities. In this view business is "fixed" as the business activities only actually take place at certain fixed locations and the movement between these locations should not interfere with the business' "fixed" status. Justification for the view that temporary interruptions are not relevant for determining permanence can be found in the OECD Commentary (Larking, 1998:267).

Of course this argument does not account for businesses which must operate while moving, such as fishing vessels. What it does is give further evidence to an expanded understanding of the meaning of "fixed" in the general PE definition. However, another argument must be considered to fishing vessels if they are to meet the "fixed" requirement. Skaar (2005:2.3.4) discusses an approach called the "*spatial delimitation method*", which states the a movable place of business which operates inside a specific place can create a PE, in spite of the fact that it does not stay in a selected place for lengthy periods of time. If the business moves within a defined area or it moves between different locations of within the defined area, it's place of business is still to be considered "fixed" (Larking, 1998:268). The argument here is that if the area of operations is set and the business operates within that area, the business can be considered "fixed" as it's area of operations are fixed. Though this argument is

commonly used to justify the creation PEs for movable drilling rigs in the mining industry, the reasoning is applicable to fishing vessels as well.

Another method that could be applied to fishing vessels is known as the "*relativity theory*", which is a perhaps the most widely used and modern solution to the problem of mobile businesses causing PEs (Strandvik, 2011:43). This theory states that "physical permanence" has a variable meaning depending on the type of business (Larking, 1998:268). This theory relies on OECD Commentary on Article 5 (Paragraph 5.1) which states a single place of business will exist if, considering the nature of the business, all the activities are commercially and geographically coherent.

"Commercially and geographically coherent" is not defined in the Commentaries. Gelineck (2016:3) takes "Geographical coherence" to mean that operations must take place within either a single place or a limited area (incorporating special delimitation theory) if the business is of a mobile nature, as fishing is. There is no specific requirement with regard to the size of this area and, therefore, it should be determined on a case by case basis.

Skaar (2005:2.3.4) confirms that commercial coherence is achieved if, from the taxpayer's client's perspective, the activities are seen as single business. Gelineck (2016:3) states that "Commercial coherence" also takes into consideration the customers of the business. If many different customers are served in a small geographical area, the commercial test may not be met. On the other hand, if a business has few customers in many different geographical areas in the same state, the commercial coherence test might be met. This highlights the view that there must be a single business presence instead of multiple small businesses.

This view is more flexible as it allows you to consider the nature of the business when determining if a business is fixed. The nature of fishing is that it is mobile, however, it is submitted that it has "commercially and geographically coherence". The fishing licence or the type of fishing generally limits the area the fishing can take place. Certain fishing can only take place in certain area or at certain depths, creating a fixed area of operation, meeting the "geographic coherence" criteria. Commercial coherence is necessarily decided on a case by case basis. Where geographic coherence is generally assured by the nature of fishing licences and fish habits, Commercial coherence is dependent on the structure of the business, which can vary depending on the scale of the operation. In any case, if commercial coherence is achieved the, the fishing vessel can be considered "fixed".

Therefore, it is submitted that fishing vessels can satisfy the location test and be considered a "fixed place of business", or at least cannot be dismissed as not meeting the requirements without considering the applicability of *the spatial delimitation method* and *the relativity theory.* It is submitted that these theories (which are substantiated by provisions in the commentary) can provide proof that a fishing vessel can be considered

"fixed" for the purposes of the general PE definition.

3.3.4 The permanence test

The enterprise must carry on its business activities in through a fixed place. The term "fixed" implies that a certain length of time is required for business activities. The place of business must be designed to serve the enterprise with a certain degree of permanence rather than merely temporarily (Vogel, 1999:287).

Interruptions of operations encountered in the normal course of an enterprise's business do not affect the permanence test, provided the business activities are resumed at the same place (Vogel, 1999:288).

For a place of business to be considered permanent, activities should be carried on for a certain period of time. Even though the 2014 OECD MTC does not provide for a threshold in this regard, an indication of what is considered to be an acceptable duration is included in the Commentary on Article 5 (OECD, 2010:95) which specifies that a period of six months is generally sufficient for a place of business to be considered permanent. This six-month time threshold is commonly accepted by most countries. Though the Commentaries do state that shorter periods can establish a PE considering the nature of the work (OECD Commentary Art 5, para 6) if the business activities take place exclusively in the source state. Mines do generally meet any permanence test and as getting a mine to its operational phase can take several years.

The six months' requirements may cause tax leakage in the fishing industry as foreign operators could operate in Namibia only during certain fishing seasons and never actually stay the required 6 months and thereby escape the PE requirement. However, OECD Commentary (Article 5 paragraph 6) allows that if the enterprise is engaged in activities of a recurrent nature, the host country may use the aggregated time spent operating in Namibia to meet the 6-month requirement. It is submitted that the Namibia's seasonal fishing cycles would qualify as "recurrent activities" and companies must account for their time in Namibia in aggregate.

3.3.5 The "right of use" test

Under this test, it should be ascertained as to whether or not the place of business is "at the disposal" of the enterprise. It is generally accepted that no legal title is required to use a particular place of business (OECD, 2010:93). The Commentary on Article 5 (OECD, 2010:93) as states that it is "immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise.". It is not necessary for the enterprise to have sole power of disposition either.

The fixed place of business must be more than just temporarily at the enterprises disposal. A fixed place of business owned by an enterprise but placed at the disposal of a third party for the latter's own business (and therefore not the enterprise's) would not for a PE for the enterprise. Though the enterprise may have the power of disposition through an employee (Vogel, 1999:286).

Given the strict regulatory environments of the mining and fishing industries discussed in Chapter 2, a "right of use" requirement would usually be met. The fishing vessel and the mine would necessarily have to be at the disposal of the taxpayer in order to generate the income that Namibia would seek to tax.

3.3.6 The business connection test

An additional test for a PE is the "business connection" test, i.e. the business activities must be carried on "through" the fixed place of business. If the enterprise carries on its operations on a regular basis through a place of business, a permanent establishment must be taken to exist, regardless of the minimum period rule laid down in Article 5(3). The twelve month test (or 6 month test for the UN MTC) applies only to building cites or construction or assembly projects and must not be interpreted to imply that a place of business should generally be deemed to be a "permanent" one if it had existed for a minimum of twelve months (Vogel, 1999:288). In contrast, it may be concluded that, except for a building site or construction or assembly project, a place of business may be fixed for the purposes for the necessary time requirement even if it is planned for fewer than 12 months.

In any case this requirement usually poses no concern for the mining and fishing industries. It is usually clear given the nature of fishing and mining that those business activities occur through the fishing vessel or mine respectively. Fishing activities are carried on in fishing vessels and mining activities must be carried on in mines.

3.3.7 The illustrative list (Article 5(2))

Article 5(2) of the OECD, UN and ATAF MTCs are a list of examples which can be taken to form a PE. These are:

a) a place of management;
b) a branch;
c) an office;
d) a factory;
e) a workshop, and

f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

However, countries are free to add additional items to this list as required.

Paragraph 12 of the OECD MTC Commentary on Article 5 (OECD, 2010) states that:

> *"This paragraph contains a list, by no means exhaustive, of examples, each of which can be regarded, prima facie, as constituting a permanent establishment. As these examples are to be seen against the background of the general definition given in paragraph 1, it is assumed that the Contracting States interpret the terms listed, "a place of management", "a branch", "an office", etc. in such a way that such places of business constitute permanent establishments only if they meet the requirements of paragraph 1."*

It is clear that the requirements of Article 5(1) must be met first in any case, which somewhat limits the effectiveness of the list. However, it can be helpful in that it gives guidance on what should at least prima facie be included in the definition of a PE.

When it comes to the mining industry "a mine, an oil or gas well, a quarry or any other place of extraction of natural resources" has obvious implications. However the OECD Commentaries state that this should be interpreted broadly to include all places of extraction of natural resources offshore as well (OECD, 2010:101), and while this does refer to off shore mining, it can potentially refer to fishing as well as giving additional credence to the submission that a fishing vessel can be considered a PE.

3.3.7.1 *Fishing vessels as "place of extraction of natural resource"*

The first question is whether fish can be considered a "natural resource". Natural resource is not defined in the UN or OECD Commentaries therefore we must consider other external sources. The OECD website does give a definition that can be used for statistical purposes (OECD, 2005:1):

> *"Definition*
>
> *Natural resources are natural assets (raw materials) occurring in nature that can be used for economic production or consumption.*
>
> *Context*
>
> *The naturally occurring assets that provide use benefits through the provision of raw materials and energy used in economic*

activity (or that may provide such benefits one day) and that are subject primarily to quantitative depletion through human use."

Fish found naturally in the ocean seems to fall into this definition quite neatly. They are naturally occurring assets with definite economic use and value. They are caught, processed and sold as an economic activity. They are also depleted through human use as was clearly the case when Namibia's pre-independence fish stocks were vastly reduced through over-exploitation. Aquaculture (i.e. fish farming) may not be considered "natural" and therefore not meet this definition. However, this dissertation is not concerned with aquaculture as there is a relatively low risk that such activity would not create a PE.

It is submitted that fish are a natural resource for the purposes of the PE article. The next question is if a fishing vessel can be considered a "place of extraction".

Firstly, consideration must be given to a concept in law called the *ejusdem generis* meaning "as the same kind". This applies to lists in legal statutes where general items in that list must be considered as similar to those specific items (Nolo's Plain -English Law Dictionary, 2005:1). If applied to the phrase "a mine, an oil, or gas well, a quarry, or any other place of extraction of natural resources"; "other place" must be seen to mean similar to a mine which would exclude a fishing vessel from being such a place of extraction. Mines and fishing vessels are too dissimilar in an ordinary sense for fishing vessels to be part of the list. However, the list in question is stated to be not exhaustive in the commentaries and therefore the *ejusdem generis* should not apply to this list (Skaar, 2005:2.2.4). Therefore, no such limitation can be applied to the interpretation of "any other place of extraction of natural resources" and a fishing vessel would not be excluded. (Skaar, 2005:2.2.4)

It must still be determined however whether a fishing vessel actually "extracts" the fish from the ocean. The OECD Commentary offers no opinion on what constitutes "extraction" or provides a definition, therefore its ordinary dictionary meaning must be used. Cambridge Advanced Learner's Dictionary & Thesaurus defines extraction as "the process of removing something, especially by force". The process of fishing also clearly complies with this definition as fish are removed from the ocean. In *Inland Revenue Commissioners v Commerzbank AG; Inland Revenue Commissioners V Banco Do Brasil SA 1990 Chancery Division* the court held the wording of a clause in a DTA should be given to the ordinary meaning of the wording of the clause unless the application of the ordinary meaning of the wording leads to a result that is absurd or unreasonable. Giving the words their ordinary meaning does not create such an absurdity and therefore must be considered.

It is therefore submitted that "any other place of extraction of natural resources" would include a fishing vessel which lends support to my argument that a fishing vessel can establish a PE as per the illustrative list.

3.3.8 Construction, assembly projects and building sites (Article 5(3))

Article 5(3) OECD MTC (OECD, 2014) provides that a building site or a construction or installation project constitutes a PE if it lasts for more than 12 months. A construction or installation project or building site is by its nature a temporary place of business, which means that it is essential that such projects are given a minimum period of continuity to impart some permanence to such activities (Passos, 2008:144).

There is a debate whether this provision creates a PE by itself or if the general rule in article 5(1) must first be satisfied. Passos (2008:145) argues that the separate paragraph indicates that a PE can only exists for such projects after the minimum period is exceeded, essentially making this an exclusive deeming provision. This would mean that the only way for these projects to form a PE would be in this way.

The corresponding article in the UN and ATAF MTC shows a change from the OECD MTC. Under Article 5 (3) UN MTC (UN, 2011), a building site, a construction, installation or assembly project constitutes a PE if it lasts for more than 6 months as opposed to the 12 months prescribed by the OECD MTC (OECD, 2014). The ATAF MTC (ATAF, 2016) prescribes no period for this provision. States would have to agree on an appropriate time limit between them, this gives more flexibility but not really more guidance. The additional reference to "assembly project" is designed to clarify that the rule also applies to the putting together of movable objects (Vogel, 1999:310).

According to the UN and ATAF MTCs, supervisory activities are included in the list that could also lead to a PE, if they are performed in connection with a building site or any envisioned other project and if they continue for more than 6 months for the UN MTC. The phrase "in connection therewith" means that supervisory activities only create a PE if they relate to a project which in turn satisfy the requirements for constituting a PE. Therefore supervision of a building site or other project lasting less than 6 months is not a PE, according to the UN MTC (Vogel, 1999:310). The impact of this in relation to mining and fishing activities is that a PE can be formed in Namibia where services are performed by employees or others for more six months, within any 12-month period (article 5(3) of the UN MTC (UN, 2011)).

Mining activities often involve the construction of roads, buildings and complex machinery, once the mine moves into the operational phase. Therefor this provision comes into play for mining at a stage when a PE will certainly be established.

Regarding the fixed location test the OECD Commentary states that:

> *"The very nature of a construction or installation project may be such that the contractor's activity has to be relocated continuously or at least from time to time, as the project*

progresses. The example cited is a situation where parts of a substantial structure such as an offshore platform are assembled at various locations within a country and moved to another location within the country for final assembly. According to the Commentary, the project results in a PE if, as a whole, it lasts more than twelve months."

Therefore, the location test is either waived or satisfied with the *relativity theory* discussed above in 3.3.3 The location test.

3.3.9 The exclusionary list (Article 5(4))

According to Article 5(4) of the OECD MTC (OECD, 2014) for a fixed place of business to qualify as a general PE, the business activities carried on through it must not qualify as preparatory or auxiliary activities.

Notably, the UN MTC differs from the OECD MTC by omitting the "delivery of goods" from Article 5(4)(a) and 5(4)(b). The omission of the words "delivery of goods" from the exclusion list in the UN MTC (UN, 2011) has the aim of providing the source country with the opportunity to tax profits attributable to PEs established as a consequence thereof. The 2011 UN MTC Commentary at of the Article 5 Paragraph 16 to 21 discussed the reason in some length. The Committee responsible for the UN MTC Commentary is of the opinion that a "warehouse" used for that purpose of "delivery" should, if the requirements of paragraph 1 are met, be a permanent establishment. The Commentaries cites a 1997 study which showed that almost 75% of the tax treaties of developing countries paragraph 4 (a) and (b) included "delivery of goods". The Committee however is of the view that a stock of goods held for prompt delivery facilitates sales of the product and thereby the earning of profit in the host country. They are of the opinion that this should therefore should be able to establish a PE. That being said, the 2011 UN MTC Commentary at of the Article 5 Paragraph 21 does state that:

"In reviewing the United Nations Model Convention, the Committee retains the existing distinction between the two Models, but it notes that even if the delivery of goods is treated as giving rise to a permanent establishment, it may be that little income could properly be attributed to this activity. Tax authorities might be led into attributing too much income to this activity if they do not give the issue close consideration, which would lead to prolonged litigation and inconsistent application of tax treaties. Therefore, although the reference to "delivery" is absent from the United Nations Model Convention, countries may

wish to consider both points of view when entering into bilateral tax treaties, for the purpose of determining the practical results of utilizing either approach."

The use of the UN MTC's exclusionary list seems to have a benefit for developing countries like Namibia. Not only would the delivery of goods from a fixed place of business involve the use of the host country's land and transport facilities, such as train lines or shipping ports, but the goods being delivered might also have been sourced in the host country as a product of the use of its natural resources, such as jewellery made from gold and diamonds for example (Collop, 2011:31). Therefore, it seems fair that delivery goods be omitted. That being said, we must consider the fact that if delivery is an entity's only activity in Namibia then not much income is going to be generated.

The ATAF MTC (ATAF, 2016), seemingly as a measure to further expand the scope of the PE article, limits the extent of the exclusionary list in paragraph 4.1:

"Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and

(a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or

(b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character, provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation."

This limitation is unique to the ATAF MTC (ATAF, 2016). The effect of this paragraph is that the exclusionary list does not apply to a fixed place of business if a company (or related company) has another fixed place of business in the country that is either a PE. Also Article 5(4) will not apply if the overall activities of both places of business would not constitute preparatory or auxiliary activities, provided they form part of a cohesive business operation. This does close up an avenue for abuse that could be exploited by companies operating in Namibia. Companies could split their business between multiple fixed locations and use the protection granted by Article 5(4) as activities at some of those places would be "preparatory or auxiliary" and the income would not be taxed. A provision such as this could have positive effects in Namibia's mining industry and

would have particular significance during the exploration phase.

3.3.9.1 *Exploration activities*

With regard to mining activities, the exploration phase raises the most questions regarding the creation of PEs. Zimmer (1993:303) states that:

> *"There is no doubt that income from [mining] is covered by the domestic rules and that such production is carried out through a permanent establishment (where a treaty applies). The problem concerns all the other activities carried out in connection with exploration and exploitation"*

Exploration is usually carried out by a mining company, typically a national or international company (Gelineck, 2016:4). Such an entity is either granted a licence to explore, or enters into an agreement with a Namibian company to explore for mining resources. Exploration includes various activities, such as sampling and seismic testing. If the exploration activities are successful and precious minerals are discovered, the mining company usually engages subcontractors or other foreign service providers, if the company does not have capabilities in-house to begin the construction of the mine (Gelineck, 2016:4).

The UN Model reproduces the OECD Commentary (The United Nations, 2009:18)[10] that states that Contracting States:

> "*may agree, for instance, that an enterprise of a Contracting State, as regards its activities of exploration of natural resources in a place or area in the other Contracting State: a) shall be deemed not to have a permanent establishment in that other State; or b) shall be deemed to carry on such activities through a permanent establishment in that other State; or c) shall be deemed to carry on such activities through a permanent establishment in that other State if such activities last longer than a specified period of time. The Contracting States may moreover agree to submit the income from such activities to any other rule."*

This is to address ambiguity about the establishment of a PE of the exploration activities as the commentary on the 2011 UN MTC is not clear. Having the parties agree bilaterally is generally the best way to avoid uncertainty and interpretational differences.

[10] Para. 5 of the Commentaries to Article 5 of the UN Model Convention that reproduces Para 15 of the Commentaries to Article 5 of the OECD Model Convention.

Exploration activities performed by a mining company can however be considered a "preparatory activity" in terms of article 5(4) of the UN and OECD MTCs. This would mean they are exempted from creating at PE. If, however the exploration activities are carried on by a contractor in Namibia, there is a risk that this would bypass the exemption if the requirements under the general rule are satisfied.

According to (Brown, 2012:19) the ambiguity and lack of consensus concerning exploration activities can always be addressed in the a few ways. The OECD suggested that parties to DTA insertion of specific provisions in their tax treaties to lessen ambiguity. The most widely used approach is to add the word "exploration" to the existing provision in the illustrative list which already included mines and oil and gas wells, as in:

> *"a mine, an oil or gas well, a quarry or other place relating to the exploration for or the exploitation of natural resources."*
>
> *or*
>
> *"an installation, a drilling rig or a ship used for the exploration for or exploitation of natural resources"* (Brown, 2012:19)

Other countries rather opt to include the exploration rule in a separate paragraph in article 5. Treaties may also expand the scope of exploration activities by the inclusion of the words "supervisory services" connected with exploratory activities.

However, as discussed above the illustrative list isn't certain to create a PE as the criteria in article 5(1) must also be met, so this measure may not completely remove the ambiguity. Also, the addition of the exploration activities under "supervisory services" does not completely resolve the issue of what the applicable test should be, it only really broadens the activities that fall within it (Gelineck, 2016:5).

To be considered a PE, an installation must first meet the "fixed" criterion discussed in the location test above (3.3.3). An installation which rests on the seabed or is anchored to it would meet the fixed criterion. Conversely, an installation which does not rest on the seabed or a floating facility at sea is not fixed and would not result in a PE using the list approach (Gelineck, 2016:5). The ATAF solves much of the ambiguity by simply deeming that an installation or structure used in the exploration for natural resources (article 5(3)(d)) would cause a PE to be formed.

What may be a potential source of profit for Namibia is that if an exploration provision deems a PE to exist for contractors that are involved with exploration activities in Namibia; then that contractor's business profits attributable to the PE will be taxable.

The mining industry may also potentially create a PE in its exploration phase through substantial use of machinery. This has particular consequence for the mining process as

its activities often involves the use of large machinery in most of its phases. The OECD, UN and ATAF MTCs omit any specific provisions dealing with the use of machinery and equipment. However, specific provisions may not be required to have machinery and equipment create a PE, if it meets the requirement for the general test in section 5(1).

It is usually in the source country's interest to have a PE established as early as possible; even though a mining country will earn much more taxable income during its operational phase than its exploration phase. We must also consider the potential negative effect for the Namibian fiscus of creating PE too early in the mining process. The exploration phase has a great deal of expenditure and not much income. It is likely that early in the exploration phase a mining operation will have large losses. If a mining operation is able to set up a PE quite early they can carry forward those losses to set off future profits. Therefore, it may be in Namibia's best interest to delay establishment of a PE until the business is actually profitable. However, Brown (2012:19) makes the point that "*The fact that the exploration activities create a PE also permits the host country to tax profits once extraction begins without further debate about when the PE came into existence.*"

3.3.10 Taxation of services and service permanent establishments

As discussed in Chapter 2, Namibia does not possess the necessary capital or expertise to find, develop, and produce their natural resources and therefore outside assistance is encouraged in the form of investment of capital and technical services. Where a Namibian company acquires the exploration licence, they usually hire contractors for some or all of such activities. Or the Namibian company may enter into a technical service contract with a foreign company to provide such services. Typically such services include renting equipment, carrying out mining exploration, providing construction or project management, and setting up infrastructure such as roads or bridges (Brown, 2012:1). The issue arises on whether the business profits generated by the various activities of these foreign service providers remain taxable in the Namibia under the relevant tax treaty. The answer to this question relies on an analysis of a number of key issues including the specific treaty terms and whether a PE is established by the foreign service providers ("FPS").

The tax consequences of when non-residents provide these services are that the income is deemed to be sourced in Namibia. However, the issue of whether the income will actually be taxable income in Namibia will only be determined by looking at the double tax agreements. The DTAs determine the taxing rights and depend on the type of services that were provided. In the case of services there is also a wide range of alternate provisions in respect of taxation rights, a number of which provide for Namibian taxation rights even in the absence of a PE. These would include the "technical services fees" article that is included in some of Namibia's DTAs. However, for the

purposes of this dissertation, we should consider when these FSPs cause PEs to be established as this will always guarantee Namibia its taxing rights.

This fishing industry has just as much need for the services of FSPs as the mining sector. Often Namibian fishing companies need to hire fishing vessels and employ fishing experts. This leasing of fishing vessels by FSPs does have the possibility to create PEs for the FSPs. There is no special rule with respect to the use of equipment. However, that does not mean that a PE does not exist with respect to that equipment. As usual, we must determine if the requirements in the general rule PE in article 5(1) have been met. As discussed, mobile equipment used in Namibia may be treated as a place of business in that state and viewed as "fixed" if the equipment is used at a particular place for more than a temporary period, or where it is used at a number of sites in a proximate geographical area as part of a coherent commercial project for a sufficient period of time (Brown, 2012:8).

Although the length of time required for permanence is far from clear, the OECD Commentaries suggest a six month test (Brown, 2012:5). The important test in the case of equipment will be whether the business is carried on wholly or partly through the fixed place of business. This issue with the 6-month test is that it may not be appropriate for fishing purposes.

The seasonal fishing cycle varies by the type of fish, however the peak for most fish is between 3 to 4 months (Food and Agriculture Organization of the United Nations, 2013). This means that the FSPs may provide their services or lease equipment for only part of the 6-month period and never actually achieve the permanence requirement. If Namibia intends to obtain PE status from these FPSs who do regularly lease equipment in Namibia, they may be required to add an additional deeming provision during its renegotiations.

Under the ordinary treatment of the OECD Model (OECD, 2014), it is possible, but fairly unlikely that FSPs would create PEs in the mining industry. According to Bruggen (2001:44) there are a few reasons for this:

- In many cases the FSP will not have nor need a fixed place of business in Namibia, but merely performs his services in the factory, offices or other facilities of the customer. It seems that making available certain premises to the performer of services only for accomplishing an assignment, is not enough to assume a PE exists with respect to the performer of the service, if the latter only uses the premises to perform their contract with the client, and has no relations with other (possible) clients, his use of the premises does not constitute a PE.
- The servicing of a know-how contract, even if done through a "fixed place of business" is an activity that has a preparatory or auxiliary character, and cannot in itself lead to taxation in the source country. Technical assistance is after all

always required when a machine is purchased, and such services should not be seen as separate from the main contract.

- Also the OECD Commentary concerning the leasing of equipment is relevant, as it states that for the leasing of tangibles and intangibles (such as know-how) such activity usually does not lead to having a permanent establishment even if, as stated in OECD Model Commentary Article 5 Paragraph 8 (OECD, 2010): "*the lessor supplies personnel after installation to operate the equipment provided that their responsibility is limited solely to the operation or maintenance of the equipment under the direction, responsibility and control of the lessee.*"
- Technical fees are often payments that refer to the hiring out of skilled technicians or consultants. The technicians or consultants involved will then perform their work in the source country, the country of the client. Their presence in the source country usually does not constitute a PE.

Although most OECD Member countries accept the appropriateness of the OECD Model (OECD, 2014) provision for the allocation of taxing rights on business profits, some countries are reluctant to adopt the principle of exclusive residence taxation of income from services that are performed in their territory but not attributable to a PE situated therein (Pijl, 2008:472). The 2008 Update to the OECD Model reconciles these different positions by leaving the PE definition in the text of the OECD Model unchanged and at the same time adding to the Commentary on Article 5 of the OECD Model (OECD, 2014) an alternative provision for states wishing to include it in their double tax conventions. Under this alternative provision, a PE is deemed to exist in certain circumstances even if there is no fixed place of business of the foreign enterprise through which the services are performed in the source state (Pijl, 2008:472). It includes two deeming rules for enterprises of a contracting state that perform services in the other contracting state (Brown, 2012:7).

The first applies if the services are provided through an individual who is present in that other state during a period or periods exceeding in the aggregate 183 days in any 12-month period, and more than 50% of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other state through that individual (Brown, 2012:7).

The second rule applies if during a period or periods exceeding in the aggregate 183 days in any 12-month period, services are performed for the same project or for connected projects through one or more individuals who are performing such services in that other state or are present in that other state for the purpose of performing such services. In either case, the activities carried on in that other state in performing these services are deemed to be carried on through a PE that the enterprise has in that other state, unless these services are of a preparatory or ancillary nature (article 5(4) of the 2014 OECD MTC). The suggested wording in the OECD Commentary is clear that these rules apply notwithstanding the requirements in article 5(1) (Brown, 2012:7).

The new OECD Commentary stresses the three basic policy principles that underlie the alternative services PE paragraph, i.e. (1) services performed outside of the source state are not taxable therein (geographical connection), (2) tax should be levied on a net rather than gross basis and (3) source state taxation is allowed only when a certain threshold is reached (Pijl, 2008:473). This brings the OECD MTC more in line with the UN MTC provision and goals for service PEs.

The UN MTC and ATAF MTC, extends the meaning of permanent establishment with regard to furnishing of services more directly in Article 5(3)(b):

> "*the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned."*

According to Bruggen (2001:44), the activity of furnishing services or consultancy must be performed within Namibia. Services which are performed in the residence state of the FSP, or in any other state besides Namibia, are not within the scope of this rule.

We must also consider that the activity must continue for more than six months in that Namibia for the same or a connected project. As discussed previously this is of concern in the fishing industry where shorter periods of activity are common. However, to overcome this Namibia could renegotiate for a shorter period.

The six-month requirement must be fulfilled within any 12-month period, irrespective of the tax year for which the service provider is being assessed. If this specification is omitted, as is often the case, the minimum period must be reached within the tax year concerned (Bruggen, 2001:44). This furnishing of services PE was included specifically to create a possibility of source taxation of payments for technological (in the broad sense of the word) services. According to a 1997 study of the International Bureau of Fiscal Documentation, around 25% of the world's tax treaties between 1980 and 1997 contain a specific provision for the furnishing of services (Bruggen, 2001:45). In practice, developing countries seem fond of the "furnishing of services" provision to curb base erosion where possible.

The current ATAF MTC however does not recommend a number of days as the 2014 UN MTC does. According to Vogel (1999:310) by stipulating this rule, the UN MTC goes beyond the "fixed base" concept since, under the rule, the mere furnishing of services as such already leads to the taxation of the enterprise by the state of source (i.e. establishing a PE), even if the enterprise has no fixed base in that state. This extension

of taxation of source is of particular significance in connection with making personnel available and with providing technical assistance, as is often required in the mining industry. Both would, under the UN MTC, and contrary to the situation under OECD MTC, result in taxation by the state which benefits from the service, in this case Namibia (Vogel, 1999:311).

UN MTC Commentary points out, albeit only as an opinion voiced by one of the member state, that its extension of the possibility of imposing tax in favour of the state of source might have undesirable effects on international trade and on the transfer of technology (Vogel, 1999:310). This is of course something Namibia must consider in its renegotiations as well.

The ATAF MTC (ATAF, 2016) further expands the scope of the deeming provisions in Article 5(3)(c). It states that an individual performing services while staying in a country will deem to have a PE if they perform those services in that country for more than a certain number of days with a 12-month period. This has broad implications for all individuals providing services in Namibia. Both the mining and fishing industries make use of foreign service providers to a great extent who usually work on the mining site or on fishing vessels. This would not capture the income generated from those industries directly but would create sources of income from within the industry. However, Namibia's negotiators must consider with a large scope increase, if such a measure would discourage foreign investment in these industries.

Article 5(3)(d) for the ATAF MTC (ATAF, 2016) includes "*an installation or structure used in the exploration for natural resources provided that the installation or structure continues for a period of not less than … days*". This inclusion clearly serves the purpose to help countries establish PE in the exploration phase of the mining process as it is specifically mentioned.

3.4 OECD BASE EROSION AND PROFIT SHIFTING ACTION 7

The OECD made specific enquiry into the artificial avoidance of PE status experienced by developing countries as part of its Action Plan on Base Erosion and Profit Shifting. They published a report on 5 October 2015, under BEPS Action 7 on "Preventing the Artificial Avoidance of Permanent Establishment Status". Briefly summarised the main issues found were (Van Duijn and Ijsselmuiden, 2016:83):

- Commissionaire arrangements and similar strategies involving agency PE status being avoided.
- The application of the specific activity exemption enabling agency PE status to be sidestepped.
- The splitting-up of contracts to avoid construction PE status.

The splitting up of contracts by contractors to circumvent PE time limits is of particular to the mining industry. As discussed above, Article 5(3) of the OECD MTC provides that building sites, construction and installation projects that last for more than 12 months are bound to form a PE. Oguttu comments that (2016:148), contractors and sub-contractors, particularly those engaged in exploration and exploitation on the continental shelf, often abuse the 12-month PE time limit by dividing contracts into several parts, each covering a period of less than 12 months, but yet all apply to the same activity.[11]

The manipulating of PE time limits is a concern to Namibia and other African countries, especially so in respect of construction, assembly and similar activities where technology can ensure that a very short time period can be spent in the source state and still result in a substantial profit for the foreign enterprise.[12]

As discussed Article 5(3)(a) of the UN MTC differs from the OECD MTC in that it also covers assembly projects or supervisory activities in connection with building sites, construction and installation project; and the 12-month period is reduced to 6 months, restricting the ability of manipulation to the PE time limit. However, Namibia may wish to negotiate an even shorter period as it would be better considering that some construction activities, for example, those undertaken by large international enterprises can be completed in three months (Hearson, 2015:21).

The Commentary on Article 5 of the OECD MTC recommends that legislative or judicial anti-avoidance rules may be applied to counter splitting up contracts and arguing their temporary nature to avoid PE statue.[13] PEs can be avoided by international companies if an enterprise fragments its activities among related enterprises or if it uses related non-resident enterprises to carry out connected projects (Oguttu, 2016:151). The ATAF MTC addition to Article 5(4) is specifically designed to help curtail this kind of abuse.

3.4 CONCLUDING REMARKS

PEs are one of the oldest and most important concepts in international tax law. The tax treaties Namibia has signed all require that the PE requirements be met in order to tax the business profits of residents of those tax treaties. The mining and fishing industries have very different concerns regarding the establishment of PEs as the activities in those industries vary. A resident of a treaty country conducting mining activities in Namibia may only escape taxation during the exploration phase of their activities, and only then if they do not register in Namibia as a branch or subsidiary. This means that if

[11] OECD Model: Commentary on Article 5 (2014), paragraph 18
[12] OECD Model: Commentary on Article 5 (2014), paragraph 10
[13] OECD Model: Commentary on Article 5 (2014), paragraph 42.54

Namibia wishes to renegotiate their tax treaties for the benefit of the mining industry, they need to ensure that the PE requirements are met as early in the exploration phase as possible.

Fishing activities in general have an issue creating PEs given the mobile nature of their activities. The OECD and UN Commentaries give little guidance on overcoming this issue without special inclusion of a separate provision. However, given the reasoning stated in this chapter and the results of the *spatial delimitation method* and the *relativity theory,* it is my position that it is possible to establish a PE from fishing without having to include a special provision.

Foreign service providers in both the mining and the fishing industries have the potential of creating PEs in Namibia, however it's rather unlikely if the OECD model (OECD, 2014) is used without the alternative provision provided in the commentary. Namibia has an interest in extending its tax net to include these service providers and we must consider if they have indeed used the alternative provision in some of their tax treaties. On the other hand, there are potential risks to extending the reach of the DTAs to specifically include these service providers. The major one being discouraging of foreign investment with such a wide increase of scope.

CHAPTER 4: ANALYSIS OF NAMIBIAN DOUBLE TAX AGREEMENTS

Having considered the application of the PE concept to the mining and fishing industries; we must now consider how the current Namibian DTAs have been structured. We will also discuss whether due consideration has indeed been given to ensure the PE article in these DTAs give Namibia adequate protection for its main industries.

Namibia has entered into a total 12 DTAs, though the one with Canada is still pending. These are as follows:

- United Kingdom (signed on 19 December 1962)
- Sweden (signed on 26 June 1995)
- Germany (signed on 27 July 1995)
- Mauritius (signed on 25 July 1996)
- India (signed on 22 January 1999)
- South Africa (signed on 11 April 1999)
- France (signed on 1 May 1999)
- Romania (signed on 5 August 1999)
- Russia (signed on 23 June 2000)
- Botswana (signed 16 June 2004)
- Malaysia (signed on 13 December 2004)
- Canada (signed on 25 March 2010, but not enforced)

A detailed analysis was performed of the PE articles in all the DTA, comparing them to the UN and OECD models to determine which one was used for each section of the paragraph. See Annexure A to C for the detailed breakdown. This chapter discuss the findings and recommendations as per the detailed analysis of Annexure A to C and its relevance for the mining and fishing industries.

4.1 ARTICLE 5 (1)

All the Namibian DTAs follow the UN and OECD article 5(1), except one, the United Kingdom ("UK"). The UK DTA was signed by South Africa on 28 May 1962 and extended to Namibia on 14 June 1967, as it was still under the administrative control of South Africa at the time. This is the only DTA in force which is signed on or before Namibian independence, however Namibia is still bound by it as Article 143 of the Namibian Constitution ratified exiting international agreements[14]. This is Namibia's oldest DTA and was in all likelihood not based on any draft of the OECD MTC. This means that it is not structured like the current OECD MTC.

[14] Article 143 of the Namibian Constitution states "All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides."

In the UK DTA, the general definitions are contained in the Article 2 and included there is the provisions for the PE article. The PE definition found there differs slightly from the modern PE definition:

> *"(k) i) The term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on;"*

The difference being that this definition uses the words "*in which*" instead of "*through which*", as with the OECD and UN MTCs. Given the age of the DTA and placing the ordinary meaning to the words, it is submitted that this difference does not actually change the meaning of the general rule PE given the wide meaning given to "*through which"* by the OECD Commentary[15]. Both iterations of the general PE definition would require that the "business connection test" be satisfied.

4.2 ARTICLE 5(2)

Article 5(2) contains the illustrative list and the Namibian DTAs have many additions and exceptions here. The following additions to the illustrative list have been identified in the DTAs:

- a warehouse, where storage facilities are provided to parties other than the enterprise (Sweden, Germany, France, Mauritius, Romania, South Africa, India, Malaysia)
- a farm or a plantation (Sweden, Malaysia, Romania)
- a guest farm or other operation of a similar nature (France, Germany, Mauritius, Sweden, Russia, India)
- a hotel (Russia)
- an orchid or vineyard (Romania)
- timber or other forest produce (UK, Malaysia)

Most of the "guest house" items on the illustrative list begin with "in the case of Namibia", to clarify that the item is specifically for Namibia's benefit. In fact, all these additions to seem to be specifically aimed for Namibia's benefit which would seem to indicate that Namibia negotiated for their inclusion. They do *prima facie* expand the scope of the operations that form a PE in Namibia. However, as discussed in Chapter 3, the illustrative list does not guarantee a PE is formed as the requirements of the general rule must be met in any case.

Therefore, these additions do not actually improve Namibia's position or increase its scope for taxing rights in a real way. It is submitted that Namibia may have negotiated for the inclusion of these items, at the expense of some other provisions which may

[15] Paragraph 4.6 of the Commentary on Article 5 of the 2014 OECD MTC

have been more useful when these DTAs were originally negotiated. If that is the case, then it is unsurprising that Namibia wants to renegotiate their DTAs.

In addition to the items added to the illustrative list added above some of the DTAs also had the following provisions:

- a building site or construction or assembly project which exists for more than twelve months (UK)
- a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than 6 to 9 months (Malaysia, South Africa)
- the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods aggregating more than six months within any twelve- month period. (South Africa)
- an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of 6 [or 9] months (Malaysia, Russia, Sweden and Botswana)

The first three additions serve to replace Article 5(3) in the OECD MTC, as they are missing from the UK, South Africa and Malaysia DTAs. This limits the applicability of what could be a strong deeming provision as it is now relegated to the illustrative list, making those provisions arguably much less effective.

The final addition to the list deals directly with exploration for mining. The significance of this insertion is that it indicates that Namibia has a desire to establish a PE in the exploration phase of mining operations. The addition gives Namibia taxing rights over income generated from lengthy exploration activities where an installation or structure is created. However, by including such a paragraph in the illustrative list rather mutes the effect of the provision as the general rule requirements must be met in any case. This would help establish a PE for an installation and similar structure used in exploration as soon as those requirements are met. However, it is submitted that this inclusion provides a time limitation that is detrimental to Namibia's overall taxing position, while adding an arguably ineffective paragraph. Having a time limitation, especially the 9-month limitation in the DTA with Malaysia, opens up the provision for abuse as taxpayers could ensure their operations do not fall foul of the time limit. As discussed in Chapter 3, there are drawbacks to establishing a PE early in the exploration phase. There is no guarantee that the exploration will yield any profits to tax and in fact often produce huge losses that can be carried forward to be set off against possible future profits.

4.3 ARTICLE 5(3)

The only DTA's to follow the OECD's MTC with regards to Article 5(3) are the France, Germany and Canada DTAs, with Canada using the 6-month limitation recommended by the UN MTC instead of 12 months. It is very interesting that these countries are all developed nations and the UN MTC would have been ideally suited in those situations. As discussed in Chapter 2, the UN MTC was specifically drafted to assign more taxing rights to developing nations when dealing with developed nations due to the asymmetric nature of their relationship.

As mentioned above, the UK, South Africa and Malaysia DTAs have their Article 5 (3) in their Article 5(2). The DTAs with Russia (Article 5(3)(b)) does not require that the six-month period be within any 12-month period, as is required by the UN MTC. They only prescribe a 6-month period, which leaves room for abuse as enterprises could operate in Namibia and arrange it so they do not fall foul of the aggregate time limitation.

There are some other minor changes. The Romania and Russia (article 5(3)(a)) DTAs have a 9-month time duration instead of the UN MTC 6-month limitation. The Indian DTA does not include consultancy fees. It does however include technical fees, which it also defines in a separate article.

The UK DTA also has the following deeming provision which reads as follows:

"an enterprise of one of the territories shall be deemed to have a permanent establishment in the other territory if it carries on the activity of providing the services of public entertainers or of athletes referred to in Article XV, in that other territory".

Article XV of the DTA then reads as follows:

"Notwithstanding anything contained in the present Convention, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the territory in which these activities are exercised"

Though these are interesting deeming provisions, these would not affect activities in the mining or fishing industries.

4.4 ARTICLE 5(4)

There are quite a few DTAs which adhere the OECD wording for Article 5(4)(a) and (b), namely the UK, Germany, South Africa, France, Romania, Malaysia and India. The main difference between the UN MTC and the OECD MTC is that the UN MTC removes "delivery of goods or merchandise" as an excluded item that causes a PE. As discussed in Chapter 3 the deletion serves the purpose of allowing a warehouse used for such delivery of goods to form a PE. The rational stated in the UN MTC Commentary is that "*that a stock of goods for prompt delivery facilitates sales of the product and thereby*

the earning of profit in the host country". The UN Commentary does note however that some countries contend that income solely from only such activity would be minimal.

The UK DTA and Botswana DTA with Namibia do not include Article 5(4)(f) of the OECD and UN MTCs, which excludes from forming a PE *"the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character*".

OECD MTC Commentary (2010:104) states that:

> *"Subparagraph f) is of no importance in a case where an enterprise maintains several fixed places of business within the meaning of subparagraphs a) to e) provided that they are separated from each other locally and organisationally, as in such a case each place of business has to be viewed separately and in isolation for deciding whether a permanent establishment exists. Places of business are not "separated organisationally" where they each perform in a Contracting State complementary functions such as receiving and storing goods in one place, distributing those goods through another etc. An enterprise cannot fragment a cohesive operating business into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity."*

This indicates that the absence of paragraph (f) does not allow an enterprise to fragment their operations and eliminate their risk of forming a PE in Namibia. Additionally, Netherland Supreme Court case[16] gives support to the idea that various preparatory or auxiliary activities can lead to a PE being formed even if each activity would have constituted a preparatory or auxiliary activities if carried out in isolation. Therefore, this inclusion is not completely necessary to extend Namibia's taxing rights in this way and safeguard against abuse.

The DTAs with Mauritius, Romania, South Africa, and the United Kingdom have all adopted the following wording for article 5(4)(e):

> *"the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise"*

Addition of the concept of "advertising" into this provision seems redundant as the OECD Commentary (2010:102) recognises that a PE won't be formed by "*fixed places of business solely for the purpose of advertising or for the supply of information or for scientific research or for the servicing of a patent or a know-how contract, if such*

[16] Hoge Raad, BNB 1976/121 (1976) E.T. 240

activities have a preparatory or auxiliary character"

In any case this study is not concerned with this addition as it involves advertising, patents and know-how contracts which are outside the scope.

Even though Article 5(5) and 5(6) are not discussed to a great extent in this study, it should be noted that the DTA's with the developed nations of Canada, Germany and France use the OECD wording for the dependent agent paragraph in Article 5(5), while the others have mostly used the UN wording with some exceptions.

4.5 TERRITORIAL SCOPE

Of particular concern to the Namibian mining and fishing industry is the territorial scope give in each DTAs. This is how Namibia is defined in the DTA and whether it is granted sovereignty over its territorial waters, EEZ and continental shelf. Without this, foreign operator may have activities in Namibia's EEZ and argue that they are not in "Namibia" as defined in the DTA.

Almost all Namibia's DTA's define Namibia as:

> *"the term "Namibia" means the Republic of Namibia and when used in a geographical sense, includes the territorial sea as well as the exclusive economic zone and continental shelf, over which Namibia exercises sovereign rights in accordance with its internal law and subject to international law, concerning the exploration and exploitation of natural resources of the sea-bed and its subsoil and adjacent waters"*

This is suitable for both the mining and fishing industries, as it recognises that activities that take place in the EEZ and on the continental shelf are activities that occur in Namibia. Currently most of the most valuable mining and fishing activities occur on the continental shelf and in the EEZ and it is therefore essential that the Namibia retains sovereignty over those areas for tax purposes.

The only DTA that does not give Namibia sufficient territorial scope is the UK DTA. This DTA defines Namibia (then known as South West Africa) as "the territory of South West Africa".

In 1962, when the UK-Namibia treaty came into effect, the "territory of South west Africa" could only mean the land region of the country and the territorial sea. The international community did not recognise South Africa's control over Namibia's EEZ and it could not therefore include it as part of the South West African territory in the UK DTA.

As the DTA is still in force as it is, there is a risk that UK residents may rely on this

interpretation and engage in fishing and even mining activities in Namibia's EEZ without registering for the applicable taxes in Namibia, arguing that the DTA does not recognise this area as "Namibia".

4.6 ADDITIONS AND RECOMMENDATIONS

When trying to determine what is the best addition to make to the DTAs during renegotiations, much can be learned from other countries with similar problems and how they resolved them. The most common approach is to add exploration to the existing "a mine, an oil or gas well, a quarry" provision in the illustrative list (Article 5(2)) to read as follows:

> *"a mine, an oil or gas well, a quarry or other place relating to the exploration for or the exploitation of natural resources."*[17]

The Canada - Trinidad and Tobago tax treaty goes a step further as it adds the following to the illustrative list, i.e.:

> (h) *a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; and*
>
> (i) *an installation or structure, including a floating structure, a drilling rig or other drilling vessels used for or in connection with the exploration or exploitation of natural resources.*

Namibia does in fact have similar provisions in its DTAs with Malaysia, Russia, Sweden and Botswana. However, as discussed in Chapter 3, the illustrative list does not assure the existence of a PE as the general rule PE requirements must be met in any case. Therefore, these additions aren't considered an effective tool for Namibia.

An exploration provision can be added to Article 5(3) which gives a little more assurance to establishment of the PE. Canada - Kazakhstan tax treaty for example includes article 5(3)(b) which states:

> *An installation or structure used for the exploration of natural resources, or supervisory services connected therewith, or a drilling rig or ship used for the exploration of natural resources, but only if such use lasts for more than 3 months, or such services continue for more than 12 months.*

Even though a provision like this addresses the establishment of a PE from exploration activities directly, there is a danger of adding confusion as to what services are in

[17] Art. 5(2)(f) Canada - Kazakhstan tax treaty dated

connection with exploratory activities. It also expands the scope of what might be considered a PE beyond those enterprises undertaking activities directly relating to the exploration of natural resources (Brown, 2012:3).

The Canada - United States tax treaty includes a standalone provision dealing with exploration activities, Article 5(4) states that:

> *... the use of an installation or drilling rig or ship in a Contracting State to explore for or exploit natural resources constitutes a permanent establishment, if such use is for more than three months in any twelve-month period.*

From the provision it is clear that when a party carries on exploration activities in the other's territory for more than 3 months a PE is established, even if the nature of the business is temporary. However, it is still unclear if general rule in article 5(1) must be met depending on how the word "constitutes" is interpreted.

The South Africa tax treaty with New Zealand has an even more straightforward deeming provision article 5(4):

> *An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if for more than six months:*
>
> *(a) it carries on activities that consist of, or that are connected with, the exploration for or exploitation of natural resources situated in that State; ...*

This provision both deems a PE to come into existence and the activity to be carried on through the PE. It completely displaces the general rule article 5(1) and replaces it with an activity/time test (Brown, 2012:4). Such a treaty would undoubtedly be of use for Namibia and it effectively circumvents the article 5 (1) requirement.

As mining and exploration usually involve the use of heavy machinery, Namibia can create a potential opportunity from deeming a PE be created through the use of substantial machinery and equipment in Namibia. Both the OECD and UN MTCs omit specific provisions dealing with the use of machinery and equipment, therefore Namibia would have to negotiate to insert these in its DTAs.

The Australia - New Zealand tax treaty provides that such a provision:

> *... where an enterprise of State A carries on activities (including the operation of substantial equipment) in State B in the exploration for or exploitation of natural resources or standing timber situated*

> *in State B for more than 90 days in any 12 month period; or operates substantial equipment in State B for more than 183 days in any 12 month period, such activities shall be deemed to be carried on through a PE of the enterprise in State B.*[18]

This provision provides deeming rules regarding the use of machinery to establish a PE. The Australia – France tax treaty is similar and provides that:

> *An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if:*
>
> *[…]*
>
> *c) it maintains substantial equipment for rental or other purposes within that State (excluding equipment let under a hire purchase agreement) for more than six months.*[19]

These provisions would be included as a separate paragraph in article 5 and deems an enterprise to have a PE and to carry on business through that PE if substantial equipment is being used in Namibia, including earth-moving equipment or a drilling rig. Such a provision would however be quite broad as the only requirement is that the equipment belongs to the service provider though not actually used by the service provider (Brown, 2012:18). Therefore, if they lease the equipment out to someone, the lessee's use of the machinery will satisfy the requirements for the provision and the PE will be established. This may therefore create unnecessary confusion and uncertainty, to the detriment of international investment. Namibia's current DTAs unfortunately do not have specific provisions related machinery and equipment.

[18] Art. 5(4)(b) and (c) Australia - New Zealand tax treaty dated 29 June 2009.
[19] Art. 5(4)(c) Australia - France tax treaty dated 20 June 2006.

CHAPTER 5: CONCLUSION

The study examines the role DTAs and specifically the PE provision have had in Namibia's ability to tax foreign enterprises operating within their borders; particularly, in its mining and fishing industries. As discussed in Chapter 2, Namibia has the practical policy of taxing any company that registers a branch or a subsidiary with their government and therefore only unregistered foreign enterprises from DTA countries may rely on those DTAs to avoid taxation of business profits. This policy may not be correct according to the DTAs as Namibia should determine if the POEM of the company is outside of Namibia, and if so the PE requirements must be met.

The danger for Namibia is that mining exploration permits and fishing licenses can be obtained without being registered in Namibia and therefore companies are potentially able to escape taxation in Namibia. Additionally, natural persons do not need to incorporate at all. Namibia has decided to investigate and renegotiate their current DTAs instead of making any unilateral change to their legislation which might contravene the non-discrimination clause in the DTAs or good faith provision in the Vienna Convention on the law of treaties. This may discourage foreign direct investment which is of particular concern to the mining industry as exploration requires a huge initial investment and Namibia has a stated interest in increasing foreign capital inflow to that sector.

The mining process is quite lengthy and at the point when an exploitable resource is found in quantities to make a mine commercially viable, it is almost certain that a PE will be formed. As discussed in Chapter 2, the risk of PEs not being formed is present in the exploration phase of the mining process. Therefore, if Namibia wishes to expand its taxing rights with regards to the mining industry it should look at establishing a PE in the as soon as possible in the exploration phase. Though a PE can be formed by a foreign enterprise during the exploration phase once the requirements are met, the best way to insure prompt PE establishment is with the addition of an additional provision into the DTA as discussed in Chapter 4.

Namibia has twelve DTAs in place, though the Canadian one is not enforced and currently pending as of this study. Of the DTAs analysed there were quite a few additions to the illustrative list which seemed of particular significance to Namibia; such as a farm, a guesthouse and installation or structure used for the exploration of natural resources. There must be a real concern for Namibia as these additions have an arguably low impact as the requirements of Article 5(1) have to be met in any case, according to OECD commentary. What's worrying is that Namibia may actually have conceded on other issues in the DTA for the inclusion of these paragraphs and concede on other, perhaps more impactful provisions. In addition to that there is a concern that

the exploration provision in the DTA with Malaysia, Russia, Sweden and Botswana[20] may actually be to Namibia's detriment. As discussed in Chapter 4, this addition provides an absolute time limitation that may be open for abuse or manipulation to ensure that the time limit is never actually met. Another issue which has come to light is that the PE article with developed nations seem to be based more on the OECD rather than the UN MTC, which is designed specifically with the needs of developing nations in mind. The UK DTA in particular is woefully outdated and may in fact not allow Namibia to claim full territorial rights over its EEZ. It would be advisable Namibia to consider the PE provisions on the UN and ATAF MTCs when renegotiating their DTAs. The ATAF MTC would provide the most taxing rights to Namibia and has specific anti-avoidance provisions useful to the mining industry.

Another potentially large problem is the new DTAs have no provisions that deal with fishing directly, which is of concern as fishing is Namibia's second largest industry. In Chapter 3 reasons were given why a fishing vessel could form a PE. These arguments address how a mobile place of business could satisfy the basic rule PE and would also constitute "another place of extraction of natural resources" in terms of Article 5(2)(f) of the OECD and UN Models.

The arguments made however have not been accepted by the general international tax community or been tested in an international court of law. In fact, the only judicial pronouncement on the matter of a fishing vessel is that it cannot be a PE (Strandvik, 2011,99). Therefore, reliance on the arguments made to include fishing vessels as a PE is not advisable from a practical point of view. To avoid doubt Namibia must specifically include a provision relating to fishing vessels; otherwise, there is a risk that fishing vessels may fail the general rule test. Also it cannot simply be added to the illustrative list in Article 5(2) as that does not circumvent the requirements of Article 5(1). It is therefore recommended that a separate special provision in Article 5 be inserted to absolutely guarantee that fishing vessels can form a PE.

[20] "an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of 6 [or 9] months"

ANNEXURE A: PE DEFINITION OF OECD, UN AND ATAF MTC

OECD MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:
a) a place of management;
b) a branch;
c) an office;
d) a factory;
e) a workshop, and
f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:
a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to

have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:
   (a) A place of management;
   (b) A branch;
   (c) An office;
   (d) A factory;
   (e) A workshop;
   (f) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. The term "permanent establishment" also encompasses:
   (a) A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;
   (b) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;
(b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;
(c) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
(e) The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.
(f) The maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person— other than an agent of an independent status to whom paragraph 7 applies—is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:

(a) Has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or
(b) Has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

6. Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.

7. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he

will not be considered an agent of an independent status within the meaning of this paragraph.

8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

ATAF MODEL AGREEMENT FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:
   (a) a place of management;
   (b) a branch;
   (c) an office;
   (d) a factory;
   (e) a workshop;
   (f) a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources.

3. The term "permanent establishment" shall be deemed to include:

   (a) a building site, a construction, assembly or installation project or any supervisory activity in connection with such site or project, but only where such site, project or activity continues for a period of more than ..... months;
   (b) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by an enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods exceeding in the aggregate ……. days in any twelve-month period commencing or ending in the fiscal year concerned;
   (c) for an individual, the performing of services in a Contracting State by that individual, but only if the individual's stay in that State, for the purpose of performing those services, is for a period or periods aggregating more than ….. days within any twelve-month period commencing or ending in the fiscal year concerned.

(d) an installation or structure used in the exploration for natural resources provided that the installation or structure continues for a period of not less than ……..days.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity;
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

4.1 Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and

(a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or
(b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character, provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation

5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are

a) in the name of the enterprise, or
b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or
c) for the provision of services by that enterprise,

that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if

exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. (a) Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

(b) For the purposes of this Article, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

7. Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 6 applies.

8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

ANNEXURE B: COMPARISON OF NAMIBIA'S DTAS TO THE OECD AND UN MTC PE ARTICLES

Article 5	Sweden	France	United Kingdom
(1)	UN and OECD	UN and OECD	the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on
(2)	UN and OECD	UN and OECD	UN and OECD
(a)	UN and OECD	UN and OECD	UN and OECD
(b)	UN and OECD	UN and OECD	UN and OECD
(c)	UN and OECD	UN and OECD	UN and OECD
(d)	UN and OECD	UN and OECD	UN and OECD
(e)	UN and OECD	UN and OECD	UN and OECD
(f)	UN and OECD	UN and OECD	a mine, quarry or other place of extraction of natural resources
	(g) an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months;	a warehouse, where storage facilities are provided to parties other than the enterprise	a building site or construction or assembly project which exists for more than twelve months
	(h) a farm or a plantation; and	a guest farm in the case of Namibia	an enterprise of one of the territories shall be deemed to have a permanent establishment in the other territory if it carries on the activity of providing the services of public entertainers or of athletes referred to in Article XV, in that other territory
	(i) a warehouse, where storage facilities are provided to parties other than the enterprise.		
(3)	UN	OECD	
(a)	UN		
(b)			
(4)	UN and OECD	UN and OECD	the term "permanent establishment" shall not be deemed to include
(a)	UN	OECD	OECD
(b)	UN	OECD	OECD
(c)	UN and OECD	UN and OECD	UN and OECD

(d)	UN and OECD	UN and OECD	UN and OECD
(e)	UN and OECD	UN and OECD	the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise
(f)	UN and OECD	UN and OECD	
			a person acting in one of the territories on behalf of an enterprise of the other territory -- other than an agent of an independent status to whom sub-paragraph (vi) applies -- shall be deemed to be a permanent establishment in the first-mentioned territory if he has, and habitually exercises in that territory, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise
(5)	UN	OECD	
(a)	UN		
(b)	UN		
(6)		OECD	
(7)	UN	OECD	an enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business in that other territory through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of
(8)	UN		UN

Article 5	Germany	Canada	South Africa
(1)	UN and OECD	UN and OECD	UN and OECD
(2)	UN and OECD	UN and OECD	UN and OECD
(a)	UN and OECD	UN and OECD	UN and OECD
(b)	UN and OECD	UN and OECD	UN and OECD
(c)	UN and OECD	UN and OECD	UN and OECD
(d)	UN and OECD	UN and OECD	UN and OECD
(e)	UN and OECD	UN and OECD	UN and OECD
(f)	UN and OECD	a mine, an oil or gas well, a quarry or any other place relating to the exploration for or the exploitation of natural resources	UN and OECD
			a warehouse, where storage facilities are provided to parties other than the enterprise
			a guest farm or other operation of a similar nature
			a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods aggregating more than six months within any twelve- month period
(3)	OECD	A building site or construction or installation project constitutes a permanent establishment only if it lasts more than six months	

(a)			
(b)			
(4)	UN and OECD	UN and OECD	UN and OECD
(a)	OECD	UN	OECD
(b)	OECD	UN	OECD
(c)	UN and OECD	UN and OECD	UN and OECD
(d)	UN and OECD	UN and OECD	UN and OECD
(e)	UN and OECD	UN and OECD	the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise
(f)	UN and OECD	UN and OECD	UN and OECD
(5)	OECD	OECD	A person acting in a Contracting State on behalf of an enterprise of the other Contracting State (other than an agent of an independent status to whom paragraph 5 applies) notwithstanding that he or she has no fixed place of business in the first- mentioned State shall be deemed to be a permanent establishment in that State if
(a)			UN
(b)			he or she maintains in the first- mentioned State a stock of goods or merchandise belonging to the enterprise from which he or she regularly fills orders on behalf of the enterprise
(6)	OECD	OECD	
(7)	OECD	OECD	UN
(8)			UN

Article 5	Russia	India	Romania
(1)	UN and OECD	UN and OECD	UN and OECD
(2)	UN and OECD	UN and OECD	UN and OECD
(a)	UN and OECD	UN and OECD	UN and OECD
(b)	UN and OECD	UN and OECD	UN and OECD
(c)	UN and OECD	UN and OECD	UN and OECD

(d)	UN and OECD	UN and OECD	UN and OECD
(e)	UN and OECD	UN and OECD	UN and OECD
(f)	UN and OECD	UN and OECD	UN and OECD
	a hotel, a guest farm or other activity of a similar nature	a warehouse, in relation to a person providing storage facilities for others	a warehouse, in relation to a person providing storage facilities for others
	an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months	in the case of Namibia, a guest farm or other operation of a similar nature	a farm, a plantation, an orchard or vineyard
(3)	UN		UN
(a)	UN	UN	UN
(b)	UN	UN	UN
(4)	UN and OECD	UN and OECD	UN and OECD
(a)	UN	OECD	OECD
(b)	UN	OECD	OECD
(c)	UN and OECD	UN and OECD	UN and OECD
(d)	UN and OECD	UN and OECD	UN and OECD
(e)	UN and OECD	UN and OECD	the maintenance by an enterprise of a fixed place of business solely for the purpose of advertising, for supply of information, for marketing research, or for similar activities which have a preparatory or auxiliary character, for that enterprise
(f)	UN and OECD	UN and OECD	UN and OECD
			the sale of displayed goods or merchandise belonging to the enterprise in the frame of an occasional temporary fair or exhibition within 30 days after the closing of the said fair or exhibition
(5)	UN	UN	UN
(a)	UN	UN	UN
(b)	UN	UN	UN
(6)	UN		UN
(7)	UN	UN	UN
(8)	UN	UN and OECD??	UN

Article 5	Malaysia	Mauritia	Botswana

(1)	UN and OECD	UN and OECD	UN and OECD
(2)	UN and OECD	UN and OECD	UN and OECD
(a)	UN and OECD	UN and OECD	UN and OECD
(b)	UN and OECD	UN and OECD	UN and OECD
(c)	UN and OECD	UN and OECD	UN and OECD
(d)	UN and OECD	UN and OECD	UN and OECD
(e)	UN and OECD	UN and OECD	UN and OECD
(f)	a mine, an oil or gas well, a quarry or any other place of extraction of natural resources including timber or other forest produce	UN and OECD	UN and OECD
	a warehouse, in relation to a person providing storage facilities for others	a warehouse, in relation to a person providing storage facilities for others	an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of more than six months
	a farm or plantation	in the case of Namibia, a guest farm or other operation of a similar nature	
	an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than 9 months		
	a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than 9 months		
(3)		UN	UN
(a)		UN	UN
(b)		UN	UN
(4)	UN and OECD	UN and OECD	UN and OECD
(a)	OECD	UN	UN
(b)	OECD	UN	UN
(c)	UN and OECD	UN and OECD	UN and OECD
(d)	UN and OECD	UN and OECD	UN and OECD
(e)	UN and OECD	the maintenance of a fixed place of business	UN and OECD

		solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise	
(f)	UN and OECD	UN and OECD	UN and OECD
(5)	UN	UN	UN
(a)	UN	UN	UN
(b)	manufactures or processes in the first-mentioned State for the enterprise goods or merchandise belonging to the enterprise	UN	UN
(6)			
(7)	UN	UN	UN
(8)	UN	UN	UN

ANNEXURE C: PE ARTICLES IN NAMIBIA'S CURRENT DTAS

Namibia has entered into a total 12 DTAs, though the one with Canada is still pending. These are as follows:

- United Kingdom (signed on 19 December 1962)
- Sweden (signed on 26 June 1995)
- Germany (signed on 27 July 1995)
- Mauritius (signed on 25 July 1996)
- India (signed on 22 January 1999)
- South Africa (signed on 11 April 1999)
- France (signed on 1 May 1999)
- Romania (signed on 5 August 1999)
- Russia (signed on 23 June 2000)
- Botswana (signed 16 June 2004)
- Malaysia (signed on 13 December 2004)
- Canada (signed on 25 March 2010, but not enforced)

The PE articles present in each are:

UNITED KINGDOM - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 2

1. In the present Convention. unless the context otherwise requires:

[…]

(k) (i) the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on;

(ii) a permanent establishment shall include especially:
(aa) a place of management;
(bb) a branch;
(cc) an office;
(dd) a factory;
(ee) a workshop;
(ff) a mine, quarry or other place of extraction of natural resources;
(gg) a building site or construction or assembly project which exists for more than twelve months;

(iii) the term "permanent establishment" shall not be deemed to include:
(aa) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
(bb) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
(cc) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(dd) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the

enterprise;
(ee) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character for the enterprise;

(iv) an enterprise of one of the territories shall be deemed to have a permanent establishment in the other territory if it carries on the activity of providing the services of public entertainers or of athletes referred to in Article 15, in that other territory;

(v) a person acting in one of the territories on behalf of an enterprise of the other territory - other than an agent of an independent status to whom sub-paragraph (vi) applies - shall be deemed to be a permanent establishment in the first-mentioned territory if he has. and habitually exercises in that territory, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise;

(vi) an enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on business in that other territory through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business;

(vii) the fact that a company which is a resident of one of the territories controls or is controlled by a company which is a resident of the other territory, or which carries on business in that other territory (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other;

SWEDEN - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5
PERMANENT ESTABLISHMENT

(1) For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

(2) The term "permanent establishment" includes especially:
(a) a place of management;
(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop;
(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(g) an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than

six months;
(h) a farm or a plantation; and
(i) a warehouse, where storage facilities are provided to parties other than the enterprise.

(3) The term "permanent establishment" likewise encompasses a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months.

(4) Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

(5) Notwithstanding the provisions of paragraphs (1) and (2), where a person - other than an agent of an independent status to whom paragraph (6) applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first- mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person

(a) has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise;

(b) has no such authority but nevertheless maintains habitually in the first-mentioned Contracting State a stock of goods or merchandise from which he or she regularly delivers goods or merchandise on behalf of the enterprise, unless the activities of such person are limited to those mentioned in paragraph (4) which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

(6) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an

independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he or she will not be considered an agent of an independent status within the meaning of this paragraph.

(7) The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise) shall not of itself constitute either company a permanent establishment of the other.

GERMANY - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5

PERMANENT ESTABLISHMENT

(1) For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

(2) The term "permanent establishment" includes especially:

(a) a place of management;
(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop;
(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(g) an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months;
(h) a warehouse, in relation to a person providing storage facilities for others; and
(i) in the case of Namibia, a guest farm or other operation of a similar nature;

(3) The term "permanent establishment" likewise encompasses:

(a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than six months; or

(b) the furnishing of services, excluding those referred to in Article 14, by an enterprise of a Contracting State through employees or other personnel engaged in the other Contracting State, provided that such activities continue for the same project or a connected project for a period or periods aggregating more than six months within any twelve months period.

(4) Notwithstanding the preceding provisions of this article, the term "permanent

establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage or display or the occasional delivery of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or occasional delivery;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprises solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

(5) Notwithstanding the provisions of paragraphs 1, and 6, where a person other than an agent of an independent status to whom paragraph 6 applies is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such person-

(a) has and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or

(b) has no such authority, but nevertheless maintains habitually in the first mentioned Contracting State a stock of goods or merchandise from which he or she regularly delivers goods or merchandise on behalf of the enterprise.

(6) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he or she will not be considered an agent of an independent status within the meaning of this paragraph.

(7) The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

MAURITIUS - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(a) a place of management;
(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop;
(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(g) a warehouse, in relation to a person providing storage facilities for others;
(h) in the case of Namibia, a guest farm or other operation of a similar nature.

3.The term "permanent establishment" likewise encompasses:

(a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than six months; or

(b) the furnishing of services, including consultancy services, by an enterprise of a Contracting State through employees or other personnel engaged in the other Contracting State, provided that such activities continue for the same project or a connected project for a period or periods aggregating more than 6 months within any 12-month period.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise; and
(f) the maintenance of a fixed place of business solely for any combination of activities mention in sub-paragraphs (a) to (e), provided that the overall activity

of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, a person acting in a Contracting State on behalf of an enterprise of the other Contracting State (other than an agent of an independent status to whom paragraph 6 applies) notwithstanding that such person has no fixed place of business in the first-mentioned State shall be deemed to be a permanent in that State if such person -

(a) has, and habitually exercises, an authority in the first-mentioned State to conclude contracts in the name of the enterprise; or
(b) maintains in the first-mentioned State a stock of goods or merchandise belonging to the enterprise from which such person regularly delivers goods or merchandise on behalf of the enterprise.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he or she will not be considered an agent of an independent status within the meaning of this paragraph.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

INDIA - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:
(a) a place of management;
(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop;
(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(g) an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months;

(h) a warehouse, in relation to a person providing storage facilities for others; and
(i) in the case of Namibia, a guest farm or other operation of a similar nature;

3. The term "permanent establishment" likewise encompasses:
(a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than six months; or
(b) the furnishing of services, excluding those referred to in Article 14, by an enterprise of a Contracting State through employees or other personnel engaged in the other Contracting State, provided that such activities continue for the same project or a connected project for a period or periods aggregating more than six months within any twelve months period.

4. Notwithstanding the preceding provisions of this article, the term "permanent establishment" shall be deemed not to include:
(a) the use of facilities solely for the purpose of storage or display or the occasional delivery of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or occasional delivery;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprises solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1, and 6, where a person other than an agent of an independent status to whom paragraph 6 applies is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such person-
(a) has and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or
(b) has no such authority, but nevertheless maintains habitually in the first-mentioned Contracting State a stock of goods or merchandise from which he or she regularly delivers goods or merchandise on behalf of the enterprise.

6. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of

their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he or she will not be considered an agent of an independent status within the meaning of this paragraph.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

SOUTH AFRICA - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:
(a) a place of management;
(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop;
(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(g) (i) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months;
(ii) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods aggregating more than six months within any twelve-month period;
(h) a guest farm or other operation of a similar nature; and
(i) a warehouse, where storage facilities are provided to parties other than the enterprise.

3. The term "permanent establishment" shall be deemed not to include:
(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the

enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise; and
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

4. A person acting in a Contracting State on behalf of an enterprise of the other Contracting State (other than an agent of an independent status to whom paragraph 5 applies) notwithstanding that he or she has no fixed place of business in the first-mentioned State shall be deemed to be a permanent establishment in that State if:
(a) he or she has, and habitually exercises, a general authority in the first-mentioned State to conclude contracts in the name of the enterprise; or
(b) he or she maintains in the first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he or she regularly fills orders on behalf of the enterprise; or
(c) he or she regularly secures orders in the first-mentioned State wholly or almost wholly for the enterprise.

5. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he or she will not be considered an agent of an independent status within the meaning of this paragraph.

6. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company as a permanent establishment of the other.

FRANCE - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(a) a place of management;
(b) a branch;
(c) an office;

(d) a factory;
(e) a workshop;
(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(g) a warehouse, where storage facilities are provided to parties other than the enterprise; and
(h) a guest farm in the case of Namibia.

3. A building site or construction or assembly or installation project also constitutes a permanent establishment, but only where such site or project continues for a period of more than six months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) The use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
(b) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
(c) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
(e) The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraph (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in that first- mentioned State in respect of any activities which that person undertakes for the enterprise if such a person has and habitually exercises in the first- mentioned State an authority to conclude contracts in the name of the enterprise, unless the activities of such person is limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business, a permanent establishment under the provisions of that paragraph.

6. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting State controls or is

controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through permanent establishment or otherwise), shall not of itself constitute either a company a permanent establishment of the other.

ROMANIA - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(a) a place of management,
(b) a branch,
(c) an office,
(d) a factory,
(e) a workshop,
(f) a mine, an oil or gas well, a quarry or other place of extraction of natural resources,
(g) a farm, a plantation, an orchard or vineyard,
(h) a warehouse, in relation to a person providing storage facilities for others.

3. The term "permanent establishment" includes also:

(a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than nine months.

(b) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any twelve- month period.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a)the use of facilities solely for the purpose of storage, display or delivery pursuant to a sale contract of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the sale of displayed goods or merchandise belonging to the enterprise in the frame of an occasional temporary fair or exhibition within 30 days after the closing of the said fair or exhibition;

(e) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;
(f) the maintenance by an enterprise of a fixed place of business solely for the purpose of advertising, for supply of information, for marketing research, or for similar activities which have a preparatory or auxiliary character, for that enterprise;
(g) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (f), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 7 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first- mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:

(a) has and habitually exercises in that State an authority to conclude are limited to those mentioned in paragraph 7 which, if exercised through contracts in the name of the enterprise, unless the activities of such person a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or

(b) has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

6. Notwithstanding the preceding provisions of this article an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.

7. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are wholly devoted on behalf of that enterprise, he/she will not be considered an agent of an independent status within the meaning of this paragraph.

8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

RUSSIA - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(a) a place of management;
(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop;
(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(g) an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than six months; and
(h) a hotel, a guest farm or other activity of a similar nature.

3. The term "permanent establishment" likewise encompasses:

(a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than nine months; or

(b) the furnishing of services, including consultancy services, by an enterprise of a Contracting State through employees or other personnel engaged in the other Contracting State, provided that such activities continue for the same project or a connected project for a period or periods aggregating more than six months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall

activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1, 2 and 3, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such person:

(a) has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or

(b) has no such authority but nevertheless maintains habitually in the first- mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

6. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise) shall not of itself constitute either company a
permanent establishment of the other.

BOTSWANA - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term “permanent establishment” includes especially:

(a) a place of management;

(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop;
(f) a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources;
(g) an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of more than six months.

3. The term "permanent establishment" likewise encompasses:

(a) a building site, a construction, assembly or installation project or supervisory activity in connection with such site or activity, but only where such site, project or activity continues for a period of more than six months;

(b) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) within the Contracting State for a period or periods aggregating more than six months in any twelve-month period.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information for the enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs (1), (2) and (3), where a person – other than an agent of an independent status to whom paragraph (6) applies – is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such person-

(a) has, and habitually exercises in that State an authority to conclude contracts in the name of the enterprise; and

(b) has no such authority, but habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders or makes deliveries on behalf of the enterprise;

unless the activities of such person are limited to those mentioned in paragraph (4) which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such a person is acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of the enterprise, he or she will not be considered an agent of an independent status within the meaning of this paragraph.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise) shall not of itself constitute either company a permanent establishment of the other.

MALAYSIA - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(a) a place of management;
(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop;
(f) a farm or plantation;
(g) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources including timber or other forest produce;
(h) an installation or structure used for the exploration of natural resources, provided that the installation or structure continues for a period of not less than 9 months;
(i) a warehouse, in relation to a person providing storage facilities for others;
(j) a guest farm or other operation of a similar nature; and
(k) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activity

continues for a period of more than 9 months.

3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of delivery, storage or display of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of delivery, storage or display;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

4. Notwithstanding the provisions of paragraphs 1, and 2, where a person B- other than an agent of an independent status to whom paragraph 6 applies -B is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such person:

(a) has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or
(b) manufactures or processes in the first-mentioned State for the enterprise goods or merchandise belonging to the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he or she will not be considered an agent of an independent status within the meaning of this paragraph.

6. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

CANADA - NAMIBIA DOUBLE TAX AGREEMENT

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially

(a) a place of management;
(b) a branch;
(c) an office;
(d) a factory;
(e) a workshop; and
(f) a mine, an oil or gas well, a quarry or any other place relating to the exploration for or the exploitation of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than six months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character; or
(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e) provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business,

would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

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